Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1994

ST. JUDE HOSPITAL OF KENNER, LOUISIANA, INC.,
Petitioner,

v.

TRAVELERS INSURANCE COMPANY

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether *res judicata* bars a plaintiff's second action against petitioner where the first action resulted in a judgment of no liability and the second action merely asserts a different theory of alleged liability arising from the same facts addressed in the first action, a question on which the court of appeals' decision is in conflict with the rulings of other federal courts of appeals.

STATEMENT UNDER RULE 29.1

In accordance with Rule 29.1 of the Rules of this Court, petitioner St. Jude Hospital of Kenner, Louisiana, Inc. states that it is a wholly-owned subsidiary of Liljeberg Enterprises Inc., a privately held corporation. Petitioner further states that it has no subsidiaries whose stock is publicly traded.

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PETITION FOR A WRIT OF CERTIORARI

St. Jude Hospital of Kenner, Louisiana, Inc. ("St. Jude Hospital" or "Petitioner"), by its undersigned counsel, respectfully petitions for a writ of certiorari to review the judgment of the court of appeals in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-8a) is reported at 37 F.3d 193. The opinions of the district court (App. 9a-14a, App. 15a-19a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 25, 1994. A petition for rehearing was denied on November 23, 1994. App. 34a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This petition primarily concerns the common law doctrine of *res judicata*, and does not require interpretation of constitutional, statutory, or regulatory provisions. Two Louisiana statutes that may be relevant, La. Code Civ. Proc. art. 737 and La. Civ. Code art. 2817, are set forth in the appendix. *See* App. 35a.

STATEMENT OF THE CASE

A. Factual Background

St. Jude Hospital is the sole general partner of St. Jude Medical Office Buildings Limited Partnership (the "Limited Partnership"). In the early 1980s, the Limited Partnership built a hospital and an adjacent office building in Kenner, Louisiana.[1]

In 1985, the Limited Partnership sought to refinance the original construction loan that had provided funding for the office building. Respondent Travelers Insurance Company ("Travelers") loaned the Limited Partnership $25,000,000 at an interest rate of 11¾% per annum. The loan was secured primarily by a mortgage on the office building and the land upon which it was built. Additional collateral was provided in the form of a contingent assignment of the rents paid for leased space in the office building.

The Limited Partnership met all of its obligations under the loan until March 1990, when it failed to make timely payment of the March monthly installment. In April 1990, Travelers notified the Limited Partnership that, if payment of all installments then due under the loan was not immediately received, Travelers would accelerate the entire mortgage debt and seek various remedies, including seizure

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[1] An earlier dispute concerning the ownership of St. Jude Hospital and its "certificate of need" from the State of Louisiana was before this Court in *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847 (1988).

and sale of the office building. Travelers also demanded that it immediately begin receiving direct payments of all rents for leased space in the office building.

B. Proceedings In *Travelers I*

In June 1990, when the Limited Partnership failed to cure the default, Travelers filed a diversity action in the United States District Court for the Eastern District of Louisiana ("*Travelers I*"), seeking monetary, declaratory, and injunctive relief. Though Travelers' lawsuit arose out of its loan to the Limited Partnership, and though the Limited Partnership was named as one defendant, the *first* defendant named in the complaint was St. Jude Hospital, and the complaint repeatedly alleged that St. Jude Hospital is the sole general partner of the Limited Partnership.[2] Also named as defendants were Liljeberg Enterprises, Inc. ("LEI") (the parent company of St. Jude Hospital), Krown Drugs, Inc. ("Krown") (another LEI subsidiary), and LEI's two owners, John A. Liljeberg and Robert L. Liljeberg.

As amended, Travelers' 37-page Complaint asserted various claims related to the Limited Partnership's default and the parties' subsequent rights and obligations. These involved: 1) the Limited Partnership's default on its payment obligations under the mortgage note and Travelers' demand that the office building be seized and sold; 2) Travelers' post-default entitlement to rents from LEI and Krown, the major tenants in the office building; 3) Travelers' right to improvements, furniture, fixtures, and equipment in the office building and to relief for damage to, or removal of, collateral securing the loan; and

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[2] *See* Second Restated and Amended Complaint ("Complaint") at ¶¶ 4 and 11. *See also* Complaint at ¶¶ 26, 37, 42, 47, 49, 51, 56, 77, 83, 88, 94, 99. A copy of the Complaint may be found at Exhibit 1 of the Record Excerpts on Behalf of Travelers Insurance Company ("Travelers' Record Excerpts"), which was filed in the court of appeals, and a copy of which has been lodged with the Clerk of this Court.

4) recognition of a property easement and continued provision of sewer and water services to the office building.[3]

No fewer than nine counts of the 12-count Complaint included St. Jude Hospital as a defendant.[4] Among other things, Travelers sought to circumvent the non-recourse provision in the mortgage note and to hold all defendants, including St. Jude Hospital, personally liable "for any and all amounts owed pursuant to the Note." Complaint at ¶¶ 96, 98 (Exhibit 1 to Travelers' Record Excerpts). In addition, Travelers sought a declaratory judgment that St. Jude Hospital was liable for any debt that any defendant owed to Travelers. Travelers requested specifically:

> That the Court issue judgment or declaratory judgment holding . . . St. Jude Hospital . . . personally liable for all indebtedness owed by any of the defendants to Travelers, including, but not limited to, the Note.

Id. at Prayer for Relief, ¶ 16.

In light of Travelers' global Complaint against St. Jude Hospital, its repeated allegation that St. Jude Hospital is the Limited Partnership's sole general partner, and its demand that St. Jude Hospital be held personally liable for the debts of the Limited Partnership and the other defendants, St. Jude Hospital naturally understood Travelers to be asserting, *inter alia*, that St. Jude Hospital, by virtue of its status as the general partner of the Limited

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[3] Also included in the lawsuit was a claim unrelated to the mortgage. Count XII of the Complaint alleges that, "[s]ubsequent to June, 1990, Travelers discovered that a leaking underground storage tank containing diesel fuel had been present on the Property." *See* Complaint at ¶¶ 99-102 (Exhibit 1 to Travelers' Record Excerpts). Travelers sought indemnification from the defendants.

[4] Only Counts I (seizure and sale of the office building for default on the mortgage note), VII (LEI's and Krown's rent payments after May 1, 1990), and IX (removal of property from the office building) did not seek relief from St. Jude Hospital. Complaint at ¶¶ 26-36, 56-76, 83-87 (Exhibit 1 to Travelers' Record Excerpts).

Partnership, should be held liable for the Limited Partnership's debts. In its answer, therefore, St. Jude Hospital cited La. Civ. Code art. 2817 (App. 35a) and pled, among other defenses, "discussion of the assets of the partnership" (*i.e.*, that partners are liable only where the partnership's assets are inadequate to eliminate the debt).[5] As the comments to Section 2817 explain:

> (a) This article sets forth the rule that creditors must look to the partnership first for the debts of the partnership. The partners are only secondarily liable. This continues the present jurisprudence, but the article adds a new provision to the effect that if a partner is sued on a partnership debt, the partner may plead discussion of the partnership's assets. A third person may sue the partnership and the partners at the same time, as provided in Article 737 of the Louisiana Code of Civil Procedure, but can recover against a partner who has properly pleaded discussion only if the partnership's assets have been exhausted or the partnership has been dissolved.

La. Civ. Code Ann. art. 2817, revision comments. Relying on Section 2817, St. Jude Hospital stated in its answer that, "[a]s a matter of law, the general and limited partners are not primarily liable for the satisfaction of the debts of [the Limited Partnership]." Answer to Second Restated and Amended Complaint at 4.

At Travelers' request, the district court granted partial summary judgment for Travelers, ordering the office building and land to be seized and sold, with the proceeds of the sale to be used to repay the note.[6] The remainder

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[5] *See* Fifth Defense of Answer to Second Restated and Amended Complaint at 2. A copy of the relevant page of the Answer may be found at Exhibit O of the Record Excerpts of Appellant St. Jude Hospital ("Petitioner's Record Excerpts"), which was filed in the court of appeals and a copy of which has been lodged with the Clerk of this Court.

[6] In October 1991, Travelers purchased the building and land at a public auction.

of the case, including Travelers' claims against St. Jude Hospital, proceeded to trial. Among the uncontested material facts to which the parties agreed in the pretrial order was that St. Jude Hospital was the general partner of the Limited Partnership. In addition, several contested facts and legal conclusions concerned Travelers' attempts to hold St. Jude Hospital liable for the debts of the Limited Partnership and other defendants. *See* Pretrial Order at 80, 88, 91 (relevant portions attached to Exhibit 2 to Travelers' Record Excerpts).

At trial, in addition to the liability theories set forth in the Complaint, Travelers argued that the Limited Partnership had impaired the mortgage collateral by negligently failing to collect certain rent payments from LEI and Krown prior to June 1990, and negligently misrepresenting that the rents had been collected. Travelers sought damages in the amount of the allegedly uncollected rents.

At the close of trial, the district court ruled that there was insufficient evidence to justify sending any of Travelers' claims against St. Jude Hospital to the jury. Travelers' case against the remaining defendants then went to the jury, and the jury awarded money damages against all defendants except St. Jude Hospital.

Based on the jury's verdict, the district court entered an Amended Judgment on December 3, 1992. The judgment: 1) ordered the Limited Partnership to pay nearly $2.5 million (plus more than $3 million in interest) for rents due between 1985 and June 1990, when the original complaint was filed (LEI and Krown were also adjudged liable for their respective portions of these rents); 2) ordered the Limited Partnership and other defendants to pay $175,000 (plus interest) for damage to collateral; and 3) ordered the Limited Partnership to pay $214,942 for breach of contract.[7] The judgment also obliged LEI

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[7] *See* Amended Judgment at ¶¶ 1-6. A copy of the Amended Judgment may be found at Exhibit K of Petitioner's Record Excerpts.

to pay $484,000, and Krown to pay $597,000, for rents due since June 1990. The judgment imposed no liability on St. Jude Hospital. In particular, the district court, by virtue of its having granted a directed verdict in favor of St. Jude Hospital, necessarily rejected Travelers' request that St. Jude Hospital be held personally liable for all indebtedness owed to Travelers by any other defendant. Travelers did not appeal the judgment as to St. Jude Hospital.

C. Proceedings In The District Court In *Travelers II*

On January 15, 1993, only six weeks after completion of its original district court litigation against the Limited Partnership, St. Jude Hospital, and the other defendants, Travelers filed the present case, a new action against St. Jude Hospital (*"Travelers II"*). The purpose of this new action was to impose on St. Jude Hospital the obligation to satisfy the judgment rendered against the Limited Partnership in *Travelers I*. Travelers' second complaint against St. Jude Hospital contained eight paragraphs—two identifying the parties, two pleading jurisdiction and venue, and four labeled "Factual Allegations." [8] The factual allegations were that: 1) St. Jude Hospital was the Limited Partnership's sole general partner; 2) Travelers had obtained a judgment against the Limited Partnership; 3) the judgment had not been satisfied; and 4) "Travelers now seeks to have St. Jude Hospital, as general partner of [the Limited Partnership], held liable for the amount due and owing by [the Limited Partnership] under the Amended Judgment." Second Complaint at ¶¶ 5-8 (Exhibit P to Petitioner's Record Excerpts).

Following St. Jude Hospital's answer, both parties moved for summary judgment. Relying on the final judgment in *Travelers I*, St. Jude Hospital's motion asserted a *res judicata* defense and argued that Travelers' second

[8] See Complaint ("Second Complaint") at ¶¶ 1-8. A copy of the Second Complaint may be found at Exhibit P of Petitioner's Record Excerpts.

action was barred because Travelers' claim in fact had been, and in any event could have been, pursued in *Travelers I*. In May 1993, notwithstanding Travelers' acknowledgment that it could have brought its claim against St. Jude Hospital in *Travelers I*, and notwithstanding the fact that only six months earlier the same parties were in trial over what obligations, if any, St. Jude Hospital owed to Travelers, the district court denied St. Jude Hospital's motion and granted Travelers' motion.

According to the district court, it rejected petitioner's *res judicata* defense because: 1) the *Travelers I* jury "was not asked to decide whether [St. Jude Hospital] would be liable to Travelers, whether primarily or secondarily, for that same debt based on its status as general partner of the [Limited] Partnership;" 2) Travelers' claim in the second action was not "part of the transaction" at issue in *Travelers I* because "Travelers' rights against [St. Jude Hospital] arose only when Travelers obtained judgment against the [Limited] Partnership and the [Limited] Partnership, in turn, was unable to pay the judgment;" 3) Travelers was not required by Louisiana law to sue the partnership and the general partner in the same action; and 4) St. Jude Hospital's presence in the earlier litigation did "not change the secondary nature of the claim asserted herein by Travelers." App. 12a.

In denying St. Jude Hospital's motion for reconsideration, the district court stated that: 1) neither the *Travelers I* "Court nor the jury decided implicitly or explicitly that . . . [St. Jude Hospital] was . . . relieved of a legal obligation to pay a debt derived from its relationship as general partner to the debtor partnership;" and 2) "the nucleus of operative facts, the common core of facts, are entirely different for each case." App. 18a and 17a (footnotes omitted). The court also declared that St. Jude Hospital had "evidently missed the point," and that *res judicata* did not apply because " 'the same cause of action' " was not involved in both cases. *Id.* at 16a, 18a

n.8 (quoting *Nilsen v. City of Moss Point*, 701 F.2d 556, 559 (5th Cir. 1983)).

D. The Court Of Appeals' Decision In *Travelers II*

The court of appeals affirmed. Reciting the factors that it considers in evaluating a *res judicata* defense, the court acknowledged that the parties were identical in both actions, that the district court was a court of competent jurisdiction, and that the judgment in *Travelers I* was final on the merits. The court then turned to the only remaining factor in its four-part *res judicata* test: "whether both cases involve the same cause of action." App. 5a. "To determine whether the same cause of action was involved," the court of appeals applied a "transactional test." *Id.* In the court's view, " 'the critical issue is not the relief requested or the theory asserted but whether [the] plaintiff bases the two actions on the same nucleus of operative facts.' " App. 5a (quoting *Matter of Howe*, 913 F.2d 1138, 1144 (5th Cir. 1990)) (bracketed word added by court below). The court then ruled that Travelers' second action against St. Jude Hospital did not arise out of the same nucleus of operative facts as *Travelers I*.

In reaching that conclusion, the court relied on its decision in *FDIC v. Mmahat*, 960 F.2d 1325 (5th Cir. 1992), *cert. denied*, —— U.S. ——, 113 S. Ct. 1044 (1993). The court acknowledged that, "unlike the partner (Duffy) in *Mmahat*, [St. Jude Hospital] was a party in the underlying litigation." App. 7a. The court concluded, however, that this is "a distinction without a difference" because, although Travelers pressed numerous claims against St. Jude Hospital in *Travelers I* and all of those claims were unsuccessful, Travelers did not, according to the court, previously sue St. Jude Hospital "for its secondary liability as the general partner." *Id.* at 7a, 8a.

REASONS FOR GRANTING THE PETITION

This case presents significant issues concerning the proper scope and application of the *res judicata* doctrine. As this Court has repeatedly emphasized, the *res judicata* doctrine is critical to both courts and litigants because it prevents costly or vexatious repetitive law suits, conserves judicial resources and frees courts to resolve other disputes, encourages reliance on judicial decisions by providing finality, and promotes simple justice. Notwithstanding its central importance to the judicial system, the doctrine is misunderstood and misinterpreted by the lower courts and by litigants. The court of appeals ignored or misapplied this Court's *res judicata* decisions, and its holding threatens to undermine the very values the doctrine is designed to protect.

Moreover, the court of appeals' decision creates a conflict among the circuits. The court's ruling is directly at odds with *Lowell Staats Mining Co. v. Philadelphia Elec. Co.*, 878 F.2d 1271 (10th Cir. 1989). The Tenth Circuit there applied the *res judicata* doctrine to bar plaintiff's effort to hold a partner that had been a party to an earlier suit secondarily liable for a partnership debt or unsatisfied judgment. *Lowell Staats Mining* is correct, the decision below is not, and this Court should resolve the conflict so that the meaning and application of *res judicata* do not depend on which side of the Texas/Oklahoma border a court or litigant is on.

Finally, guidance from this Court regarding the proper bounds of the *res judicata* doctrine will have application far beyond this case. Cases in federal court involving *res judicata* issues arise frequently, and by themselves are sufficient to establish the importance of the question presented here. But the Court's ruling would provide assistance in other circumstances as well. For example, Rule 13(a) of the Federal Rules of Civil Procedure, which governs compulsory counterclaims, is based on policies and standards very similar, if not identical, to

those presented by the *res judicata* doctrine. In addition, the Court's application of the *res judicata* doctrine under federal law doubtless would be relevant to state court interpretations of the same common law doctrine.

For all of these reasons, which are explained more fully below, the Court should grant review and provide much-needed guidance regarding the circumstances under which *res judicata* bars a subsequent action.

I. REVIEW IS WARRANTED TO PROTECT THE FUNDAMENTAL VALUES UNDERLYING THE *RES JUDICATA* DOCTRINE, AS REFLECTED IN THIS COURT'S DECISIONS, AND TO ELIMINATE CONFUSION CONCERNING THE DOCTRINE'S SCOPE AND PROPER APPLICATION

The *res judicata* doctrine bars a party "from relitigating issues that were or *could have been raised* in that action" in which a final judgment on the merits has been entered. *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981) (emphasis added). Though the doctrine's roots are ancient, this Court has "stressed that '[the] doctrine of *res judicata* is not a mere matter of practice or procedure inherited from a more technical time than ours.' " *Id.* at 401 (quoting *Hart Steel Co. v. Railroad Supply Co.*, 244 U.S. 294, 299 (1917)). Rather, " '[*i*]*t is a rule of fundamental and substantial justice, of public policy and of private peace, which should be cordially regarded and enforced by the courts . . . .*' " *Id.* (internal quotation marks deleted) (emphasis added).

As this Court has stated, proper enforcement of the *res judicata* doctrine " 'is essential to the maintenance of social order.' " *Nevada v. United States*, 463 U.S. 110, 129 (1983) (quoting *Southern Pac. R. Co. v. United States*, 168 U.S. 1, 49 (1897)). This is so because the doctrine was established " 'to secure the peace and repose of society by the settlement of matters capable of judicial determination.' " *Nevada*, 463 U.S. at 129 (quoting

Southern Pac. R. Co., 168 U.S. at 49). Other values served by the *res judicata* doctrine are "reliev[ing] parties of the cost and vexation of multiple lawsuits, conserv[ing] judicial resources, and, by preventing inconsistent decisions, encourag[ing] reliance on adjudication." *Allen v. McCurry*, 449 U.S. 90, 94 (1980) (citing *Montana v. United States*, 440 U.S. 147, 153-154 (1979)). The doctrine also "frees the courts to resolve other disputes." *Brown v. Felsen*, 442 U.S. 127, 131 (1979).

Notwithstanding its importance to society and the judicial system, the *res judicata* doctrine and the *res judicata* defense are not well understood by litigants, and the standards for its application are unclear even to the courts. As Professor Currie observed more than 15 years ago, the "obvious [res judicata] argument has an uncanny way of eluding both litigants and courts." David P. Currie, *Res Judicata: The Neglected Defense*, 45 U. Chi. L. Rev. 317 (1978). Recognizing the importance of the doctrine and the desirability of its reliable and predictable application, Professor Currie urged courts "to rethink archaic limitations on res judicata that permit unjustifiable duplication or splitting of litigation." *Id.* at 350.

The lack of clarity concerning the *res judicata* doctrine and its application is not merely an academic concern. Just last year, the Seventh Circuit

> observed that the law of res judicata is "not as clear as it might be," and lamented that in this important area of law it is most unsatisfying to rely—as the cases and commentators tell us to—on "pragmatism" and fuzzy lines . . . .

Colonial Penn Life Ins. Co. v. Hallmark Ins. Adm'rs, Inc., 31 F.3d 445, 447 (7th Cir. 1994) (quoting *Herrmann v. Cencom Cable Assocs., Inc.*, 999 F.2d 223, 226 (7th Cir. 1993)). The year before, in *Herrmann*, the court had explained the problem with a fuzzy pragmatic test:

> We're all for pragmatism, but pragmatism is not an operational legal standard. Litigants and their lawyers are entitled to clearer guidance . . . . Where certainty is at a premium [because failure to assert a claim subject to the *res judicata* doctrine bars its later prosecution], sound lawmaking requires the setting forth of clear and definite criteria rather than a general directive to decide each case in the manner that will maximize the attainment of the law's objectives. The latter approach, carried to the extreme, would reduce all law to an admonition to do what's right.

999 F.2d at 226 (Posner, J.).

The Seventh Circuit is not alone in remarking on the lack of clarity concerning application of the *res judicata* doctrine. As a leading treatise has stated:

> It would be desirable in many ways to have a simple abstract definition of so central a concept, and detailed specific rules for clear guidance in most common situations. Uncertain rules may catch litigants in traps of forfeiture, defeating just claims by procedural defaults that may become more understandable as the rules become less certain. Uncertainty intrinsically works to defeat the opportunities for repose and reliance sought by the rules of preclusion, and confounds the desire for efficiency by inviting repetitious litigation to test the preclusive effect of the first effort.

18 Charles A. Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice and Procedure* § 4407, at 48-49 (1981).[9]

Application of the *res judicata* doctrine would be made considerably simpler and more predictable if the critical

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[9] *See also* 1B James W. Moore, Jo Desha Lucas, & Thomas S. Currier, *Moore's Federal Practice* ¶ 0.410[1], at III-176 and III-187 (2d ed. 1994) ("What constitutes a single cause of action for these purposes has been a troublesome question" and "the courts have not always found it easy to draw a distinction between cases that present separate claims or causes of action and cases that present a single claim based on different theories").

inquiry were universally recognized to be the one identified by this Court in recent opinions, namely, whether the subsequent action involves claims "that were or could have been raised" in the earlier action.[10] An additional requirement of some factual relationship between the actions would avoid any claim of unfairness that might arise from today's liberal joinder rules, which, subject to *ad hoc* motions to sever, generally permit even totally unrelated claims between the same parties to be joined in a single action. When, however, the test for application of *res judicata* is expanded beyond claims "that were or could have been raised" in the earlier action to include a further requirement that the new claims involve "the same cause of action," [11] the same "nucleus of operative fact" (App. 5a), or "identity of the thing demanded [and] identity of the cause of the demand," [12] problems inevitably arise. In part, this is because, as this Court has recognized, the additional words and phrases that are sometimes used to explain *res judicata* "have not remained static over time." *Nevada*, 463 U.S. at 130.

Even within a particular phrase, common precise definitions are often absent. As the D.C. Circuit has observed concerning the phrase "cause of action,"

> [the a]uthorities do not provide a uniform definition for the term "cause of action" in connection with the application of res judicata. The term has been given varied treatment depending largely on the facts in each case.

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[10] *See Federated Dep't Stores*, 452 U.S. at 398; *Allen*, 449 U.S. at 94.

[11] *See Nevada*, 463 U.S. at 130; *Brown*, 442 U.S. at 131 (quoting *Montana*, 440 U.S. at 153); *Commissioner v. Sunnen*, 333 U.S. 591, 597 (1948).

[12] *The Washington, Alexandria, and Georgetown Steam-Packet Co. v. Sickles*, 65 U.S. 333, 341-342 (1860).

I.A.M. Nat'l Pension Fund v. Industrial Gear Mfg. Co., 723 F.2d 944, 947 (D.C. Cir. 1983) (citing *Nash County Bd. of Ed. v. Biltmore Co.*, 640 F.2d 484, 487 (4th Cir. 1981)). Other courts also have recognized that the phrase "cause of action" has different meanings in different legal contexts.[13] The courts of appeals have chosen to emphasize different aspects of the various formulations, often focusing on the "wrong" or "injury" for which relief is sought.[14]

The area is further complicated by many courts' reliance on the Restatement (Second) of Judgments, which sets forth the "pragmatic" test criticized in *Colonial Penn* and *Herrmann*. Section 24 of the Restatement states that *res judicata* extinguishes claims based on "rights of the plaintiff to remedies against the defendant with respect to *all or any part of the transaction, or series of connected transactions, out of which the* [*first*] *action arose.*" Restatement (Second) of Judgments § 24(1) (1982) (emphasis added). What constitutes a "transaction" is

> to be determined pragmatically, giving weight to such considerations as whether the facts are related in

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[13] *See, e.g., Williamson v. Columbia Gas & Elec. Corp.*, 186 F.2d 464, 469 (3d Cir. 1950) ("As has often been said, the phrase 'cause of action' means different things in different contexts") (citing *Hurn v. Oursler*, 289 U.S. 238, 247 (1933); *United States v. Memphis Cotton Oil Co.*, 288 U.S. 62, 68 (1933)). *See also Neeld v. National Hockey League*, 439 F. Supp. 446, 451 (W.D.N.Y. 1977) (same).

[14] *See, e.g., Ray v. TVA*, 677 F.2d 818, 821 (11th Cir. 1982), *cert. denied*, 459 U.S. 1147 (1983) ("The principal test for determining whether the causes of action are the same is whether the primary right and duty or wrong are the same in each case"); *Midcontinent Broadcasting Co. v. Dresser Indus., Inc.*, 669 F.2d 564, 566 (8th Cir. 1982) ("In determining whether a cause of action is the same, one has to determine whether a wrong for which redress is sought is the same for both actions"); *Cemer v. Marathon Oil Co.*, 583 F.2d 830, 832 (6th Cir. 1978) ("Where two successive suits seek recovery for the same injury, a judgment on the merits operates as a bar to a later suit, even though a different legal theory of recovery is advanced in the second suit").

> time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

Restatement (Second) of Judgments § 24(2) (1982).

Here, application of this Court's focus on claims "that were or could have been raised" in the initial action plainly would have led to sustaining the *res judicata* defense. Travelers has conceded that its claim against St. Jude Hospital in the present case could have been raised in *Travelers I*. *See* Br. for Appellee at 18 (5th Cir.). Likewise, it is clear that the Restatement's formulation, precluding claims "with respect to all or any part of the transaction" out of which the first case arose, would cover Travelers' claim against St. Jude Hospital in this action. The court of appeals, however, employing a hypertechnical view of the phrase "nucleus of operative fact," decided that Travelers should be permitted to resume litigation against petitioner only a few weeks after final judgment in the previous lawsuit. *Compare, e.g., I.A.M. Nat'l Pension Fund*, 723 F.2d at 948-949 (defining "cause of action" narrowly, by reference to specific claims and legal theories asserted, and thus rejecting *res judicata* defense), *with May v. Parker-Abbott Transfer and Storage, Inc.*, 899 F.2d 1007, 1009-1010 (10th Cir. 1990) (sustaining *res judicata* defense based on "transactional" approach of Restatement, and expressly refusing to follow *I.A.M. Nat'l Pension Fund*). This Court should intervene to clarify the rules that govern proper application of the *res judicata* doctrine, and thus to preserve and enhance the efficacy of that doctrine in protecting both courts and litigants from repetitious litigation.

II. THE COURT OF APPEALS' DECISION INVOLVES A CONFLICT AMONG THE CIRCUITS AND IS WRONG

The court of appeals' decision in this case, holding that the *res judicata* doctrine does not preclude a second action against St. Jude Hospital, directly conflicts with the deci-

sion of the Tenth Circuit in *Lowell Staats Mining*. The decision below is incorrect and seriously threatens the future usefulness of the *res judicata* defense.

A. There Is A Direct Conflict Between The Fifth Circuit's Decision In This Case And The Tenth Circuit's Decision In *Lowell Staats Mining*

In *Lowell Staats Mining*, the plaintiff ("Staats") sued Pioneer Uravan, Inc. ("PUI") for breach of contract and misrepresentations. Staats also sued Pioneer Corporation ("PC") and Pioneer Nuclear, Inc. ("PNI"), claiming, under various theories, that they were responsible for any liability of PUI. The court entered a directed verdict in favor of PC and PNI, and the jury awarded Staats more than $600,000 in damages against PUI.[15]

When it was unsuccesful in collecting the full judgment against PUI, Staats filed a second action against PC, PNI, and others, alleging that they were liable for the unsatisfied portion of the judgment. One of Staats' theories for recovery in the second action was that PNI was a partner of PUI, and therefore liable for the judgment against PUI, and that PC was likewise responsible for the judgment as a successor corporation to PNI. The district court *sua sponte* applied the *res judicata* doctrine, and dismissed Staats' claim. 660 F. Supp. at 811-815. In the court's words, "[a]ny claim of PNI liability arising out of the purported partnership relationship . . . should have been litigated in Staats I and is precluded by res judicata." *Id.* at 814.

The Tenth Circuit affirmed, "for substantially the same reasons set forth in the district court's opinion in *Staats v. PEC II*, 660 F. Supp. at 811-16." 878 F.2d at 1278. The court of appeals thus adopted the district court's reasoning with respect to the application of *res judicata* to Staats' partnership-related claims. Because that reasoning

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[15] The abbreviations of the parties' names used in the text are the ones that were used in the district court decision. 660 F. Supp. 809 (D. Colo. 1987). In the court of appeals' opinion, PUI is referred to as "Uravan," PC as "Pioneer," and PNI as "Nuclear."

has such direct application to the present case, we set it forth at some length:

> The fifth claim for relief against PNI is based on the joint responsibility of PNI and PUI to pay any adverse judgment rendered in *Staats I*. This payment obligation is contained in a July 31, 1984 agreement among PUI and defendant PNI, [and others] . . . . Staats characterizes this agreement as a partnership dissolution or settlement agreement. . . .
>
> Staats now contends 'that PNI had agreed to pay and was obligated to satisfy the *Staats*' [*I*] judgment" . . . .
>
> The payment claim could, and should, have been raised in *Staats I*. Staats was obviously aware of the payment claim before *Staats* I was tried . . . . The payment claim could readily have been added to Staats' claims against [PC and PNI]. Staats, however, did not seek leave to undertake any such an action. Moreover, the payment claim was clearly related in time and origin to the other . . . claims [against PC and PNI]. . . . The payment claim would have formed a convenient trial unit along with those pre-existing . . . claims [against PC and PNI]. Thus, the payment claim is part of the same transaction or series of transactions which gave rise to *Staats I*. . . . The payment claim is therefore subject to the claim preclusive effect of the doctrine of res judicata. . . .
>
> * * * *
>
> The situation is similar for the seventh claim. That claim asserts that PNI, as a partner of PUI, is liable for PUI's debts. The seventh claim further avers PC is liable because it acquired PNI assets. . . . Any claim of PNI liability arising out of the purported partnership relationship . . . should have been litigated in Staats I and is precluded by res judicata. PNI is therefore dismissed from the seventh claim. Again, since PC's liability is contingent on PNI's liability, PC is also dismissed from the seventh claim.

660 F. Supp. at 813-814.

As in *Lowell Staats Mining*, St. Jude Hospital was a party to the first litigation, and its role as the sole general partner of the Limited Partnership was well known to Travelers. As in *Lowell Staats Mining*, any "payment claim [of Travelers against St. Jude Hospital] could, and should, have been raised" in the earlier action. 660 F. Supp. at 813. Travelers "was obviously aware of the payment claim" and the "payment claim could readily have been added to [Travelers'] claims" to form "a convenient trial unit." *Id.* The "payment claim was clearly related in time and origin" to Travelers' other claims, and it was "part of the same transaction or series of transactions" addressed in *Travelers I, i.e.*, an effort to recover, and to render St. Jude Hospital liable for, debts of the Limited Partnership arising out of the parties' business relationship. Just as the *res judicata* doctrine barred the plaintiff's subsequent claims in *Lowell Staats Mining*, so it barred Travelers' follow-up claim against St. Jude Hospital in the present case.

The decisions in *Lowell Staats Mining* are consistent with decisions issued by other federal courts in comparable situations.[16] The decisions are also consistent with decisions issued by state courts in the same or comparable situations.[17]

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[16] *See, e.g., Lary v. Ansari*, 817 F.2d 1521, 1523 (11th Cir.), *cert. denied*, 484 U.S. 964 (1987) ("[b]ecause [plaintiff] had an opportunity in his first lawsuit to litigate claims relating to his business relationship with [defendant], any future claims relating to the same business relationship are barred by *res judicata*"); *Manego v. Orleans Board of Trade*, 773 F.2d 1, 6-7 (1st Cir. 1985), *cert. denied*, 475 U.S. 1084 (1986) (*res judicata* bars plaintiff's antitrust claim where plaintiff earlier brought an action alleging that some of the same defendants had conspired to deny plaintiff's entertainment and liquor license based on racial animus); *Olmstead v. Amoco Oil Co.*, 725 F.2d 627, 632 (11th Cir. 1984) (plaintiff's fraud claim should have been brought in defendant's earlier eviction proceeding against plaintiff because defendant's termination of plaintiff's lease was "at the core" of both suits).

[17] *See, e.g., Barr v. RTC*, 837 S.W.2d 627 (Tex. 1992) (*res judicata* doctrine bars suit against partner for payment of partner-

B. The Decision Below Improperly Constricts The Scope Of The *Res Judicata* Doctrine And Departs From This Court's Precedent

There are three fundamental errors in the court of appeals' *res judicata* discussion and its conclusion that the doctrine does not apply to Travelers' claim against St. Jude Hospital in this case.

The court of appeals' first error was that it accorded no weight to this Court's repeated holdings that the *res judicata* doctrine bars not only claims or issues that were in fact litigated in the first action, but also claims or issues that "*could have been raised.*" *Federated Dep't Stores*, 452 U.S. at 398 (emphasis added); *see also Allen*, 449 U.S. at 94. In this case, Travelers voluntarily elected to bring St. Jude Hospital before the district court in *Travelers I*. No one forced Travelers to sue St. Jude Hospital in that case; Travelers chose to do so, and it named St. Jude Hospital as the first defendant in the suit. Moreover, Travelers' claims against St. Jude Hospital were extensive. St. Jude Hospital was explicitly named, or included in the group of all defendants, in nine of the 12 counts in Travelers' Complaint.

As an examination of the Complaint shows, *Travelers I* was in the nature of a "global action," in which Travelers appeared to raise all of the claims it wished to assert against the Limited Partnership, LEI, Krown, the Liljebergs, and St. Jude Hospital.[18] Travelers also admittedly

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ship's promissory note based on "his status as a partner" where the plaintiff previously sued the partner asserting liability for the same promissory note based on the partner's alleged guarantee); *Magic Valley Radiology, P.A. v. Kolouch*, 849 P.2d 107, 110 (Idaho 1993) (*res judicata* doctrine bars action to collect from shareholders a judgment against the corporation where plaintiff previously sued the shareholders "based on their personal conduct").

[18] *See U.S. Indus., Inc. v. Blake Constr. Co.*, 765 F.2d 195, 206 (D.C. Cir. 1985) (filing of "global action" encompassing many claims in complex case is relevant to determining application of *res judicata* doctrine).

knew throughout *Travelers I* of St. Jude Hospital's status as the Limited Partnership's sole general partner. It pled that fact over and over in its Complaint and made it one of the uncontested material facts in the first case.

Further, Travelers reasonably could and should have anticipated before and during *Travelers I* that the Limited Partnership would be unable to satisfy a large money damages verdict. After all, even before trial, Travelers had obtained partial summary judgment against the Limited Partnership, and the Limited Partnership had lost its office building and land as a result.

Finally, early in the *Travelers I* litigation, St. Jude Hospital's answer, pleading the defense of "discussion" under Louisiana law, had to have put Travelers on notice of its possible claim against the general partner for secondary liability on the Limited Partnership's debts, even if Travelers did not believe that it already had included such a claim in its multifarious Complaint. Under these circumstances, the only reasonable conclusion is that Travelers could and should have raised its general partner liability claim against St. Jude Hospital in the first action, rather than waiting until a few weeks after the entry of judgment in *Travelers I* to begin this new lawsuit.

Instead of focusing on the *res judicata* doctrine's "could have been raised" standard, the court of appeals relied on what it called the "controlling precedent" of *FDIC v. Mmahat*, 960 F.2d 1325 (5th Cir. 1992), *cert. denied*, —— U.S. ——, 113 S. Ct. 1044 (1993). *See* App. 6a. There, however, *unlike here*, the partner against whom an action was brought to satisfy a judgment entered against the partnership in an earlier case was *not* made a party to the first action. Having improperly narrowed the *res judicata* doctrine's scope, the court of appeals erroneously concluded that the fact that Travelers named St. Jude Hospital as a defendant in the *Travelers I* litigation was a "distinction without a difference" for *res judicata* purposes.

The court of appeals' second error was in concentrating excessively on Travelers' legal theories in its two actions against St. Jude Hospital rather than addressing the fundamental nature of Travelers' claim in both actions. The court of appeals, applying the "transactional test" of the Restatement (Second) of Judgments, concluded that the two actions did not "arise from the same nucleus of operative facts" because Travelers' legal theories allegedly were different—the claim against St. Jude Hospital in *Travelers I* was for its primary liability for the debts of the Limited Partnership "based on its conduct" whereas the claim against St. Jude Hospital in *Travelers II* was "for its secondary liability as the general partner." App. 7a.

Ignored in the court of appeals' analysis is the undisputed fact that what Travelers sought in both *Travelers I* and *Travelers II* was payment of a debt arising out of the Limited Partnership's failure to fulfill its obligations under a single mortgage loan agreement. Also ignored is the undisputed fact that in both cases Travelers asserted theories seeking to have St. Jude Hospital held personally liable for the debts of the Limited Partnership. Similarly disregarded in the court of appeals' discussion is the undisputed fact that Travelers in both actions pled St. Jude Hospital's status as the Limited Partnership's general partner, identifying it as a *material* undisputed fact in *Travelers I*. Because the court of appeals failed to give weight to these facts, Travelers was allowed to do what other courts have prohibited, "to Balkanize" its claims and bring multiple suits. *See U.S. Indus.*, 765 F.2d at 206.

Finally, the court of appeals improperly justified its decision based on an *ad hoc* assessment of the amount of harm created by the court's refusal to recognize a preclusive *res judicata* effect.

> [St. Jude Hospital] did not have to relitigate issues from [*Travelers I*]; any repetition of effort common to both actions would be *de minimis*. No doubt economy and efficiency would have been advanced by

> asserting in [*Travelers I*] a claim against [St. Jude Hospital] for secondary liability; but, as much as we counsel—indeed, require—judicial efficiency and economy, they do not trump Travelers' right to bring [a second] action, in light of its not being barred by *res judicata*.

App. 8a n.9. This Court has unequivocally rejected attempts to make application of the *res judicata* doctrine depend upon such an *ad hoc* assessment of the extent of the harm that would result, in the individual case, to the values protected by *res judicata*. In the Court's words,

> "[s]imple justice" is achieved when a complex body of law developed over a period of years is evenhandedly applied. The doctrine of res judicata serves vital public interests beyond any individual judge's ad hoc determination of the equities in a particular case. There is simply "no principle of law or equity that sanctions the rejection by a federal court of the salutary principle of res judicata.'

Federated Dep't Stores, 452 U.S. at 401 (quoting *Heiser v. Woodruff*, 327 U.S. 726, 733 (1946)).

In the first action, Travelers, according to its own characterization of the Complaint, elected not to assert all grounds available to hold St. Jude Hospital liable for the Limited Partnership's debts. It should not now be heard to complain about application of the *res judicata* doctrine to its second action against St. Jude Hospital. This is particularly "compelling in view of today's crowded dockets":

> "The predicament in which respondent finds himself is of his own making . . . . [W]e cannot be expected, for his sole relief, to upset the general and well-established doctrine of res judicata, conceived in the light of the maxim that the interest of the state requires that there be an end to litigation—a maxim which comports with common sense as well as public policy. And the mischief which would follow the es-

> tablishment of precedent for disregarding this salutary doctrine against prolonging strife would be greater than the benefit which would result from relieving some case of individual hardship."

Federated Dep't Stores, 452 U.S. at 401-402 (quoting *Reed v. Allen*, 286 U.S. 191, 198-199 (1932)).

Rather than "cordially" embracing the "could-have-been-raised" scope of the *res judicata* doctrine, the court of appeals adopted a grudging approach that, if permitted to stand, would severely undermine both the doctrine itself and the important interests it is intended to protect.

III. REVIEW BY THIS COURT WOULD HAVE A SALUTARY EFFECT NOT ONLY ON THE *RES JUDICATA* DOCTRINE BUT ALSO ON RELATED FEDERAL RULES

The significance of the issues raised in this petition, and this Court's response to them, extends to areas of the law beyond the *res judicata* doctrine. The most obvious further application of the ruling in this case involves Rule 13(a) of the Federal Rules of Civil Procedure, which governs the assertion of compulsory counterclaims.[19]

There are significant similarities between the *res judicata* doctrine and Rule 13(a). The consequence of failing to plead a compulsory counterclaim is that the claim is barred in a subsequent action. *See Baker v. Gold Seal Liquors, Inc.*, 417 U.S. 467, 469 n.1 (1974). The consequence of a *res judicata* finding is the same. Like the *res judicata* doctrine, Rule 13(a) is intended to avoid superfluous litigation, to improve efficiency and thereby benefit the court system and the parties, and to encourage

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[19] Fed. R. Civ. P. 13(a) provides that a counterclaim must be asserted

> if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

finality and an end to litigation. *See, e.g., Southern Constr. Co. v. Pickard,* 371 U.S. 57, 60 (1962); *Columbia Plaza Corp. v. Security Nat'l Bank,* 525 F.2d 620, 626 (D.C. Cir. 1975); 6 Charles A. Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice and Procedure* § 1409, at 46 (1990). In many ways, the *res judicata* doctrine and Rule 13(a) are complementary, the former imposing on plaintiffs (as well as other parties) the same kind of obligation that the latter imposes on defendants. The two are frequently discussed together.[20]

In seeking to determine whether claims arise from a single "transaction or occurrence" so as to render a counterclaim compulsory, many courts have considered, among other inquiries, whether *res judicata* would bar a subsequent suit on defendant's claim, even apart from Rule 13(a). *See, e.g., McCaffrey v. Rex Motor Transp., Inc.,* 672 F.2d 246, 248 (1st Cir. 1982) (quoting 6 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1410, at 42 (1971)); *Plant v. Blazer Fin. Servs., Inc.,* 598 F.2d 1357, 1360 (5th Cir. 1979) (citing same); *Sue & Sam Mfg. Co. v. B-L-S Constr. Co.,* 538 F.2d 1048, 1051-1053 (4th Cir. 1976) (citing same). There is considerable logical appeal to the notion that comparable standards should be applied to both the plaintiffs *and* the defendants in an earlier action to determine whether they should be barred from asserting subsequent claims. Indeed, the Seventh Circuit has acknowledged that its "test for determining whether a counterclaim is compulsory [may be] simply to ask whether the claim would also be barred by res judicata . . . ." *Colonial Penn,* 31 F.3d at 448. Guidance from this Court concerning the appropriate scope and application of the *res judicata* doctrine, therefore, will also bene-

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[20] *See, e.g., Colonial Penn,* 31 F.3d at 447-448; *Employers Ins. of Wausau v. United States,* 764 F.2d 1572, 1576 (Fed. Cir. 1985); *Sue & Sam Mfg. Co. v. Lee,* 538 F.2d 1048, 1052 (4th Cir. 1976).

fit courts and litigants faced with Rule 13(a) compulsory counterclaim issues.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 21, 1995

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APPENDIX

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 93-3731

TRAVELERS INSURANCE COMPANY,
Plaintiff-Appellee,

v.

ST. JUDE HOSPITAL OF KENNER, LOUISIANA, INC.,
Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana

Oct. 25, 1994

Rehearing and Suggestion for Rehearing En Banc
Denied Nov. 23, 1994

Before HIGGINBOTHAM, JONES, and BARKSDALE, Circuit Judges.

RHESA HAWKINS BARKSDALE, Circuit Judge:

St. Jude Hospital of Kenner, Louisiana, Inc. (SJH), one of several defendants in an earlier action by Travelers Insurance Company in which liability was imposed against the limited partnership for which SJH was the general

parner, but not imposed against SJH, challenges on *res judicata* grounds an adverse summary judgment for its secondary liability, as general partner, for the judgment against the partnership. It asserts primarily that, because it was a defendant in the first action, it was necessary for Travelers to press the secondary liability claim then, or be barred by *res judicata* from making it later. We AFFIRM.

I.

In June 1990, Travelers filed a multi-count complaint (the Partnership Litigation) against, *inter alia*, St. Jude Medical Office Building Limited Partnership (Partnership) and SJH, its general partner. One of the counts sought judgment against the Partnership on its promissory note to Travelers. That note was secured by a mortgage on the property on which the Partnership's St. Jude Medical Office Building (the building) stood. The hospital's (SJH's) property was adjacent to that of the building.

The 12-count complaint concerned five distinct transactions: 1) the Partnership's default on the promissory note; 2) the collateral assignment right of leases in the building to Travelers as part of the security for the promissory note; 3) the threat by various defendants to terminate water and sewerage service to the building; 4) the removal of furniture, fixtures, and equipment from the building; and 5) environmental damage to the property. The claims against SJH arose only out of either its ownership of the property adjacent to the building (the third and fifth transactional areas), or its participation in the removal of furniture, fixtures, and equipment from the building (the fourth transactional area). No reference was made to SJH's secondary liability for any judgment rendered against the Partnership.

In answer to the complaint, however, SJH and the limited partners raised the secondary liability defense of discussion "in response to the claims asserted against them

by [Travelers]." [1] But, SJH failed otherwise to pursue the issue.[2]

The jury trial resulted in a judgment against the Partnership. Travelers did not prevail on any of its claims against SJH.

When efforts to collect the judgment from the Partnership failed, Travelers filed this action against SJH, the Partnership's general partner, in order to do so (the SJH Litigation).[3] Both parties sought summary judgment. Travelers asserted that Louisiana law required a partner to pay the debts of its partnership; SJH, that, because of the Partnership Litigation, Travelers' claim was barred by *res judicata*. Primarily, SJH asserted that, because it was a defendant in the Partnership Litigation, Travelers was required to assert all claims against it in that litigation, including any for secondary liability on a judgment against the Partnership. The district court awarded summary judgment to Travelers.

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[1] Discussion is "the right of a secondary obligor to compel the creditor to enforce the obligation against the property of the primary obligor or, if the obligation is a legal or judicial mortgage, against other property affected thereby, before enforcing it against the property of the secondary obligor." La.Civ.Proc. art. 5151.

[2] Article 5155 of La.Civ.Proc. provides that:

> In pleading discussion, the secondary obligor shall: (1) Point out by a description sufficient to identify it, property in the state belonging to the primary obligor, or otherwise subject to discussion, which is not in litigation, is not exempt from seizure, is free of mortgages and privileges, and is worth more than the total amount of the judgment or mortgage; and (2) Deposit into the registry of the court, for the use of the creditor, an amount sufficient to defray the costs of executing the judgment or enforcing the mortgage against the property discussed.

[3] This action is part of the continuing litigation between Travelers and John A. and Robert Liljeberg. *See, e.g., Travelers Ins. Co. v. Liljeberg Enters., Inc.*, 7 F.3d 1203 (5th Cir.1993), *aff'g in part, rev'g in part*[,] 799 F.Supp. 641 (E.D.La.1992) (summary judgment declaring obligation of building lessee to enter into lease

II.

It goes without saying that we review a summary judgment *de novo*. *E.g., King v. Provident Life and Accident Ins. Co.*, 23 F.3d 926, 928 (5th Cir.1994). Here, there is no dispute of material fact. At issue is whether the district court erred, especially in light of the fact that SJH was a defendant in the Partnership Litigation, in holding that *res judicata* does not bar Travelers, as a judgment creditor of the Partnership, from pursuing that judgment against SJH based on its secondary liability.[4] Although this is a diversity action, federal *res judicata* rules apply in resolving the preclusive effect of the Partnership Litigation, also a diversity action. *Sidag Aktiengesellschaft v. Smoked Foods Prods.*, 776 F.2d 1270, 1273 (5th Cir.1985); *Seven Elves, Inc. v. Eskenazi*, 704 F.2d 241, 244 n. 2 (5th Cir.1983).

In this circuit, an action is barred by the doctrine of *res judicata* if: 1) the parties are identical in both actions; 2) the prior judgment was rendered by a court of competent jurisdiction; 3) the prior judgment was final on the merits; and 4) the cases involve the same cause of action. *Nilsen v. City of Moss Point, Miss.*, 701 F.2d 556, 559 (5th Cir.1983) (en banc) (quoting *Kemp v. Birmingham News Co.*, 608 F.2d 1049, 1052 (5th Cir.1979)). At

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with Travelers); *Travelers Ins. Co. v. Liljeberg Enters., Inc.*, 38 F.3d 1404 (5th Cir.1994) (appeal of the district court's denial of Rule 60(b)(6) motions); *Travelers Ins. Co. v. St. Jude Hospital of Kenner, La., Inc.*, 38 F.3d 1414 (5th Cir.1994) (appeal of the district court's quantification of attorneys' fees); *Travelers Ins. Co. v. St. Jude Medical Office Bldg. Ltd. Partnership*, 843 F.Supp. 138 (E.D.La.) (denying motion to recuse, revoking fraudulent conveyances, and awarding sanctions), amended and supplemented, 154 F.R.D. 143 (E.D.La.1994) (quantifying sanctions); *Travelers Ins. Co. v. St. Jude Hospital of Kenner, La., Inc.*, 157 F.R.D. 386 (E.D.La.1994) (quantifying sanctions).

[4] In addition, SJH moved unsuccessfully to have Rule 11 sanctions imposed against Travelers on the ground that it brought this action in the face of the claimed *res judicata* bar; it presses that issue here. Obviously, in light of our affirmance, this issue is moot.

issue is only the last factor: whether both cases involve the same cause of action.

To determine whether the same cause of action is involved, our court utilizes a transactional test. *E.g., Agrilectric Power Partners, Ltd. v. General Elec. Co.*, 20 F.3d 663, 665 (5th Cir.1994); *Matter of Howe*, 913 F.2d 1138, 1144 (5th Cir.1990); *Robinson v. National Cash Register Co.*, 808 F.2d 1119, 1124-25 (5th Cir.1987). Under this test,

> the critical issue is not the relief requested or the theory asserted but whether [the] plaintiff bases the two actions on the same nucleus of operative facts. The rule is that res judicata "bars all claims that were or could have been advanced in support of the cause of action on the occasion of its former adjudication, . . . not merely those that were adjudicated."

Howe, 913 F.2d at 1144 (quoting *Nilsen*, 701 F.2d at 560) (footnotes omitted).

Louisiana recognizes a partnership as a separate entity; initially, a creditor of a partnership must bring suit against the partnership, but can join the partners in that action. See La.Code Civ.Proc. art. 737;[5] *State v. Morales*, 256 La. 940, 240 So.2d 714, 716 n. 3 (1970); *Falcon Drilling Co. v. Transamerican Energy, Ltd. II*, 622 So.2d 745, 747 (La.App. 3d 1993) (partner may be joined as a party defendant in the original action against the partnership). And, under Louisiana's entity theory of partnership, the creditor of a partnership should seek recovery first against the partnership. *See* La.Civ.Code art. 2817;[6]

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[5] La.Code Civ.Proc. art. 737 provides:

> A partnership has the procedural capacity to be sued in its partnership name. The partners of an existing partnership may not be sued on a partnership obligation unless the partnership is joined as a defendant.

[6] La.Civ.Code art. 2817 states:

> A partnership as principal obligor is primarily liable for its debts. A partner is bound for his virile share of the debts of the partnership but may plead discussion of the partnership.

Koppers Co. v. Mackie Roofing & Sheet Metal Works, 544 So.2d 25, 26 (La.App. 4th 1989) (intent of the law is that recovery be sought first against the primary debtor, the partnership); *see also Federal Deposit Ins. Corp. v. Mmahat*, 960 F.2d 1325, 1328-29 (5th Cir.1992) (general discussion of actions against a partnership, including the partner's secondary liability), *cert. denied*, —— U.S. ——, 113 S.Ct. 1044, 122 L.Ed.2d 353 (1993).

The foregoing discussion of Louisiana partnership law is simply a backdrop to controlling precedent in our circuit, *Mmahat*. There, our court held implicitly that, under Louisiana law, a judgment creditor's claim against a partner for his virile share of a judgment against the partnership does not arise out of the same nucleus of operative facts as the partnership's debt. In *Mmahat*, the Federal Savings and Loan Insurance Corporation (FSLIC) obtained a judgment against Mmahat and the partnership of Mmahat & Duffy for legal malpractice and breach of fiduciary duty (first action). Subsequently, the FSLIC sued Duffy for his virile share of the judgment against the partnership.

Duffy asserted that *res judicata* barred the action against him on the ground that it "arose from the same transaction as" the first action and should have been included in it. 960 F.2d at 1329. We held otherwise, reasoning that the action against Duffy

> does not rest on an identical obligation, nor does it require readjudication of the malpractice claim. [The first action] was based on the malpractice of Mmahat, committed as a partner of the firm. In contrast, [the present action] is based on the pre-existing . . . judgment against Mmahat and [the partnership] and Duffy's virile share of liability for that debt pursuant to Louisiana Civil Code Article 2817. Thus, the FDIC did not pursue a new theory of recovery in

> [the present action]; it sought merely to collect a pre-existing judgment in its favor. Obviously, res judicata would bar [the present action] if the FSLIC had lost in [the former action] because the FDIC would be seeking to relitigate the issue of liability. However, res judicata does not bar the FDIC's suit against Duffy to collect the judgment it obtained against [his] firm.

Id. at 1329-30.[7]

There is, however, one differing procedural aspect between this action and *Mmahat*; unlike the partner (Duffy) in *Mmahat*, SJH was a party in the underlying litigation. As noted, SJH hangs its hat primarily on this distinction. In fact, it conceded at oral argument that, had it not been a party in the Partnership Litigation, it would have no basis for claiming *res judicata*. (As discussed, SJH was not sued in the Partnership Litigation for its secondary liability as the general partner; instead, its presence was based on its conduct as an adjacent landowner to the building and its involvement in the removal of property from the building.[8]

SJH presents a distinction without a difference. In essence, it seeks to conflate the first (identical parties)

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[7] The FSLIC instituted each action. Subsequently, Congress abolished the FSLIC; all of its assets, including the claims against the partnership and Duffy, were transferred to the FSLIC Resolution Fund. The Federal Deposit Insurance Corporation (FDIC), as manager of this fund, became the real party in interest in the action. *Mmahat*, 960 F.2d at 1327 n. 5. Accordingly, the court refers to the FDIC as the appellant in *Mmahat*, while the FSLIC was the original plaintiff.

[8] SJH contends also that its secondary liability was raised and litigated in the Partnership Litigation. But, although the facts supporting SJH's secondary liability (*i.e.*, the existence of the Partnership's liability and SJH's status as its general partner) arose during the Partnership Litigation, SJH's secondary liability was not in issue.

and fourth (same cause of action) factors in our *res judicata* analysis. But, because we are dealing with the transactional test aspect (fourth factor), SJH's presence in the Partnership Litigation is immaterial in determining whether this action (the SJH Litigation) is barred. The issue, in its simplest terms, is whether Travelers' claim against SJH in this action arises from the same nucleus of operative facts as in the Partnership Litigation. As stated, pursuant to the holding in *Mmahat*, it does not.[9]

III.

For the foregoing reasons, the judgment is

AFFIRMED.

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[9] Our court noted in *Kasper Wire Works, Inc. v. Leco Eng'g & Mach., Inc.*, 575 F.2d 530, 535 (5th Cir.1978), that "[t]he aim of claim preclusion is . . . to avoid multiple suits on identical entitlements or obligations between the same parties, accompanied, as they would be, by the redetermination of identical issues of duty and breach." The SJH Litigation does not raise entitlement or obligations which were identical to those litigated in the Partnership Litigation. Thus, SJH did not have to relitigate issues from the Partnership Litigation; any repetition of effort common to both actions would be *de minimis*. No doubt, economy and efficiency would have been advanced by asserting in the Partnership Litigation a claim against SJH for secondary liability; but, as much as we counsel—indeed, require—judicial efficiency and economy, they do not trump Travelers' right to bring this action, in light of its not being barred by *res judicata*.

UNITED STATES DISTRICT COURT
E.D. LOUISIANA

Civ. A. No. 93-173

SECTION: "I" (6)

THE TRAVELERS INSURANCE COMPANY

v.

ST. JUDE HOSPITAL OF KENNER, LA., INC.

ORDER AND REASONS

Before the Court are cross motions for summary judgment filed by plaintiff, Travelers Insurance Company ("Travelers"), and St. Jude Hospital of Kenner Louisiana, Inc. ("SJH"). Travelers seeks to have liability imposed on SJH, as a result of its status as general partner of St. Jude Medical Office Building Limited Partnership ("the Partnership"), for the debt owed to Travelers by the Partnership pursuant to this Court's Judgment in the matter entitled "Travelers Insurance Company v. St. Jude Hospital of Kenner, Louisiana, Inc. et al.", Civil Action No. 90-1983 c/w No. 90-2601. SJH contends that it was a party to the action from which the Judgment resulted and, because it was not cast in judgment in the previous lawsuit, Traveler's claim against it in this lawsuit is barred by the doctrine of res judicata.

FACTUAL BACKGROUND

SJH is, and at all material times has been, the general partner of St. Jude Medical Office Building Limited

Partnership, a limited partnership organized and existing under the laws of the State of Louisiana. On December 3, 1992, this Court entered an Amended Judgment in favor of Travelers and against the Partnership in an amount in excess of $4.1 million.

Travelers sets forth as an uncontested material fact that the Partnership has failed to make any payment toward its debt under the Amended Judgment and seeks, through this action, to have SJH cast in judgment for the debts of its partnership.

In response, SJH contends that, because it was a defendant in the previous litigation and was not cast in judgment therein, Travelers' attempt to enforce the judgment against it is barred by res judicata.

LAW AND ANALYSIS

Under Louisiana law, a partnership is primarily liable for its debts. A partner is bound for his virile share of the debts of the partnership but may plead discussion of the assets of the partnership. La.Civ.Code art. 2817. A partner may not be sued on a partnership debt unless the partnership is joined as a defendant. La.Code of Civ.Proc. art. 737. Louisiana courts have interpreted these articles to require that a partnership creditor first exhaust his rights against the partnership before he proceeds against the individual partners. *Koppers Co. v. Mackie Roofiing & Sheet Metal Works*, 544 So.2d 25, 26 (La.App. 4th Cir. 1989). The Koppers court went on to note that "there is no requirement that the partners be named defendants in the suit against the partnership. Article 737 [of the Louisiana Code of Civil Procedure] requires only the converse." *Id.*

Our Fifth Circuit was recently called upon to apply these principles and found that "[n]either federal nor Louisiana law requires the joinder of all partners in an

action against a partnership." *FDIC v. Mmahat*, 960 F.2d 1325, 1328 (5th Cir.1992). In *Mmahat*, the FDIC was attempting to enforce a judgment against Peter Duffy on the basis of a judgment it obtained in a previous litigation against the partnership Mmahat & Duffy. Peter Duffy was a partner in Mmahat & Duffy. Duffy argued that res judicata required dismissal of the claim against him on the basis of the prior action against the partnership or not at all. The trial court agreed and dismissed the FDIC's claim against Duffy. In reversing the dismissal, the Fifth Circuit held:

> *Duffy* does not rest on an identical obligation, nor does it require readjudication of the malpractice claim. *Mmahat* was based on the malpractice of Mmahat, committed as a partner of the firm. In contrast, *Duffy* is based on the pre-existing $35 million judgment against Mmahat and M & D and Duffy's virile share of liability for that debt pursuant to Louisiana Civil Code Article 2817. Thus, the FDIC did not pursue a new theory of recovery in *Duffy*; it sought merely to collect a preexisting judgment in its favor. Oviously, res judicata would bar *Duffy* if the FSLIC had lost in *Mmahat* because the FDIC would be seeking to relitigate the issue of liability. However, res judicata does not bar the FDIC's suit against Duffy to collect the judgment it obtained against the firm.

Id. at 1329-30.[1]

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[1] This is in accord with Louisiana law, as set forth in *Koppers, supra*, which noted:

> However, when the [district] court dismissed the partners [on the basis of res judicata], the proverbial "catch 22" situation was created. The effect of that ruling is that the partners may never be called upon to satisfy their secondary obligation. Thus, if allowed to stand, the trial court's ruling would make it mandatory that the partners be named as defendants every time a partnership is sued. This is not the law's intent.

This Court concludes that the claim of Travelers against SJH to enforce against SJH the judgment debt of the Partnership is not barred by res judicata. The principal test for comparing causes of action is drawn from § 24 of the Restatement of Judgments 2d, which provides that:

> . . . , the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.

Nilsen v. City of Moss Point, Miss., 701 F.2d 556 (5th Cir. 1983). Travelers' rights against SJH arose only when Travelers obtained judgment against the Partnership and the Partnership, in turn, was unable to pay the judgment. The "transactional test" set forth in *Nilsen*, therefore, does not preclude Travelers' claim against SJH.

SJH contends that *Koppers* and *Mmahat* are distinguishable from this case because the partner[s] against whom the creditors in those cases sought to collect the judgment were not made parties to the claims against the partnership. SJH's presence as a party in the litigation against the Partnership, however, does not change the secondary nature of the claim asserted herein by Travelers. The jury that found the Partnership liable to Travelers was not asked to decide whether SJH would be liable to Travelers, whether primarily or secondarily, for that same debt based on its status as general partner of the Partnership. That SJH was not made a part of the judgment in the initial litigation does not relieve it of its obligations as partner. That matter was not before the jury and is not now precluded.

Having decided that Travelers' claim against SJH is not barred, the Court now turns to the issues presented by Travelers' motion for summary judgment against SJH. As discussed above, Louisiana law allows a partner who

has properly plead discussion to compel a creditor of the partnership to enforce its obligation against the assets of the partnership before turning to the individual partner for payment. La.Code of Civ.Proc. art. 5151 *et seq.* These articles place the burden on the partner who invokes discussion to point out the assets of the partnership to the creditor. La.Civ.Code art. 2817, comment (a).

SJH's right to the benefit of discussion does not, however, prevent this Court from granting judgment against it for the debts owed by the Partnership. The Court finds that there is no dispute as to SJH's status as general partner of the Partnership. SJH does not contest this point. The Louisiana codal articles on discussion provide that this Court may enter judgment against SJH along with the Partnership, but require that Travelers first "execute its judgment against the property discussed." La.Code of Civ.Proc. art. 5156. Only after the "property discussed" has been applied toward the judgment and the judgment remains unsatisfied may Travelers proceed to execute its judgment against SJH.

Although SJH has listed discussion as a defense in its Answer, it has not fulfilled the requirements that would entitle it to the benefit of discussion. SJH must properly plead discussion before being entitled to avail itself of its benefits. Louisiana's codal articles on discussion require that:

> In pleading discussion, the secondary obligor shall:
>
> (1) Point out by a description sufficient to identify it, property in the state belonging to the primary obligor, or otherwise subject to discussion, which is not in litigation, is not exempt from seizure, is free of mortgages and privileges, and is worth more than the total amount of the judgment or mortgage; and
>
> (2) Deposit in to the registry of the court, for the use of the creditor, an amount sufficient to defray

> the costs of executing the judgment or enforcing the mortgage against the property discussed.

La.Code of Civ.Proc. art. 5155.

A review of the record reveals that SJH has failed to properly plead discussion of the Partnership's assets. SJH has made no effort to identify assets of the Partnership that can be executed on by Travelers. The Court, therefore, will order that within 15 days from the entry date of this order SJH will identify partnership property which may be "discussed." If the "property discussed" is not identified within such time, judgment shall be entered against SJH without benefit of discussion.

Accordingly,

IT IS ORDERED that:

1. Plaintiff's, The Travelers Insurance Co., Motion for Summary Judgment is GRANTED;

2. Defendant's, St. Jude Hospital of Kenner, La. Inc., Motion for Summary Judgment is DENIED;

3. Within 15 days from the entry date of this order, defendant, St. Jude Hospital of Kenner, La. Inc., will file with the Court the identity and description of partnership property which may be "discussed." If the "property discussed" is not identified within such time, judgment shall be entered against SJH without benefit of discussion. If the property is identified within such time, judgment shall be entered against defendant, St. Jude Hospital of Kenner, Louisiana, Inc., for all amounts owed to plaintiff by St. Jude Medical Office Building Limited Partnership under the Amended Judgment entered on December 3, 1992 in "Travelers Insurance Company v. St. Jude Hospital of Kenner, Louisiana, Inc., *et al*", Civil Action No. 90-1983 c/w No. 90-2601, subject to the St. Jude Hospital of Kenner, Louisiana, Inc.'s rights of discussion.

New Orleans, Louisiana, this 18[th] day of May, 1993.

/s/ Henry A. Mentz
United States District Judge

UNITED STATES DISTRICT COURT
E.D. LOUISIANA

Civ. A. No. 93-0173

SECTION: "I" (2)

THE TRAVELERS INSURANCE COMPANY

v.

ST. JUDE HOSPITAL OF KENNER, LOUISIANA, INC.

ORDER AND REASONS

Before the Court is Defendant's Motion for Reconsideration of the Court's Order and Reasons rendered May 18, 1993, which is DENIED for the following reasons.

BACKGROUND

In a prior motion before the Court, Travelers sought summary judgment against St. Jude Hospital of Kenner, Louisiana, Inc. ("SJH"), as a result of its status as general partner of St. Jude Medical Office Building Limited Partnership ("the Partnership"), for the debt owed to Travelers by the Partnership pursuant to this Court's Judgment in the matter entitled "Travelers Insurance Company v. St. Jude Hospital of Kenner, Louisiana, Inc. et al." Civil Action No. 90-1983 c/w No. 90-2601 ("the previous lawsuit"). SJH, in a cross motion for summary judgment, contended that it was a party to the action from which the Judgment resulted and, because it was not cast in judgment in the previous lawsuit, Traveler's claim

against it in this lawsuit is barred by the doctrine of res judicata. In the motion presently before the Court, SJH is seeking reconsideration of this Court's granting Travelers[']motion for summary judgment and denying SJH's motion for summary judgment.

ANALYSIS

SJH has referred the Court to the transcript of the opening argument of counsel for Travelers in the previous lawsuit and has highlighted statements of counsel regarding SJH as a defendant in that suit. No one denies that SJH was named a defendant in the previous lawsuit or that Travelers sought to find SJH primarily liable for the damages caused to Travelers' collateral. Indeed, the Court directed a verdict in SJH's favor during the conference on jury charges and interrogatories in the previous lawsuit.

Nevertheless, SJH once again reurges in yet another form that because SJH was a party to the previous lawsuit and not cast in judgment, the claim in the present suit is barred by res judicata. The Court by its May 18th order rejected this argument, and by this ruling does so again. SJH has evidently missed the point.

It is true that the Court in it's [*sic*] May 18th Order cited cases in which a claim was allowed against a partner later sued [1] for his share of a judgment previously rendered against the partnership. It is also true that unlike *Mmahat* [2] and its kind where the partner was not named in the earlier suit against the partnership, in this instance SJH was named as a defendant and played an active part in the litigation. But in addition, defense counsel erroneously argue that at that time alone SJH should have been subject to any and all claims against it by Travelers.

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[1] [F]or the first time by the plaintiff[.]

[2] *FDIC v. Mmahat*, 960 F.2d 1325, (5th Cir.1992) [.]

Thus far allusive [*sic*] to SJH is the point which defeats SJH's argument: SJH may have been a party to and an active participant in both the instant case and the previous lawsuit, but the nucleus of operative facts, the common core of facts,[3] are entirely different for each case.

In the previous lawsuit, the thrust was who *did* or *failed to* do what. As stated by SJH at page 9 of its Consolidated Memorandum,

> The 1990 suit was filed against SJH as the sole general partner of [The Partnership] and was based on intentional and negligent acts and omissions concerning among other claims, breach of contract to prove a servitude, the failure to collect rental payments, and actionable waste.

Clearly, the previous lawsuit sounds in tort, totally unlike the instant one which, no matter how it is dressed up, is fundamentally a collection suit.[4] The issues and the facts in the present case have as their core who *owns* what, who possesses it and when. Indeed the whole "who owns what and when" question is so convoluted and intertwined

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[3] See *Robinson v. National Cash Register Co.*, 808 F.2d 1119 (5th Cir. 1987) [.] A case where the later claim was barred by res judicata, "the Robinsons 1984 suit is basically the same as the 1981 suit that they tried and lost; in both suits the Robinsons sought to recover for claimed personal injuries, loss of business, and loss of profits arising out of the contamination of the subleased air space by NCR. *The same nucleus of facts is involved, and the relief requested in the two suits is identical.*" Emphasis added, at 1125.

[4] The partnership law issues are a red herring. All parties and the court agree that a third party is entitled by law to proceed against the partner after it has procured judgment against the partnership, and need not name the partner in the action against the partnership. However, debate over partnership law has not successfully distracted focus from the fundamental issue of by whom and with what is the judgment from the previous lawsuit to be paid.

that it has spawned another round of motions [5] and lawsuits [6] in the Liljeberg shell game.

All this Court decided by its directed verdict in the previous lawsuit was that SJH had no duty to provide a servitude, nor did it fail to collect rental payments or commit actionable waste. By their decisions rendered in the previous lawsuit, neither the Court nor the jury decided implicitly or explicitly that a party dismissed from primary liability for damages arising out of tortious acts and omissions was at the same time relieved of a legal obligation to pay a debt derived from its relationship as general partner to the debtor partnership.[7]

Because the facts in the case at bar do not arise from the same core of facts of the previous lawsuit, Travelers' present claim against SJH for the debt owed Travelers by the Partnership is not barred by res judicata. *Robinson*, 808 F.2d at 1125; *Nilsen v. City of Moss Point*, 701 F.2d 556 (5th Cir.1983).[8]

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[5] [E.]g. Opposition of Travelers Insurance Company to List of Partnership Property Which May be Discussed[.]

[6] *In re Liljeberg Enterprises, Inc.*, No. 93-10295B; *The Travelers Insurance Company v. St. Jude Medical Office Building Limited Partnership and Liljeberg Enterprises, Inc.*, Adversary Proceeding No. 93-1119[.]

[7] The previous lawsuit proved a challenge to determine the extent of damages to and the condition, location, and viability of Travelers' collateral and improvements. Travelers understandably chose to proceed another day to determine who owned sufficient assets, when and where, to cover the judgment. The discussion issues have generated sufficient litigation of their own.

[8] [I]n Nilsen, 701 F.2d at 559, the Fifth [C]ircuit stated "For a prior judgment to bar an action on the basis of res judicata, the parties must be identical in both suits, the prior judgment must have been rendered by a court of competent jurisdiction, there must have been a final judgment on the merits, *and the same cause of action must be involved in both cases.*" Emphasis added. Of course it is the last criteria which is not met in this case in order

SJH's motion is DENIED. These arguments have been considered and reconsidered by this Court for the last time.

New Orleans, Louisiana, this 21st day of July, 1993[.]

/s/ Henry A. Mentz
United States District Judge

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to bar the claim. It is also the last criteria, that SJH first quoted in its Consolidated Memorandum but later omitted, by strategy or otherwise, in its Reply Memorandum. Indeed it is the last criteria which illuminates where SJH's argument fails.

[Filed Jul. 30, 1993]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 93-0173
SECTION "I"
MAG. DIV. 4

THE TRAVELERS INSURANCE COMPANY,
Plaintiff
versus
ST. JUDE HOSPITAL OF KENNER, LOUISIANA, INC.,
Defendant

JUDGMENT

Considering this Court's May 20, 1993 Order and Reasons granting the Travelers Insurance Company's motion for summary judgment, the failure of defendant, St. Jude Hospital of Kenner, Louisiana, Inc. to identify property of the St. Jude Medical Office Building, [a] Limited Partnership which may be "discussed" as requested by the May 20 Order, and this Court's July 23, 1993 Order and Reasons denying St. Jude Hospital of Kenner, Louisiana, Inc.'s motion for reconsideration of the May 20 Order,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Judgment be, and the same hereby is rendered in favor of the Travelers Insurance Company, the plaintiff in this action, and against the defendant, St. Jude Hospital of Kenner, Louisiana, Inc., without benefit of discussion, for any and all damages, interest and other obligations, indebtedness or relief owed to Travelers Insurance Company by the St. Jude Medical Office Building, [a] Limited Partnership pursuant to the

Amended Judgment entered December 3, 1992 in the action entitled "Travelers Insurance Company v. St. Jude Hospital of Kenner, Louisiana, Inc., et al" Civil Action NO. 90-1983 c/w No. 90-2601, and for all costs of this proceeding.

New Orleans, Louisiana, this 30th day of July, 1993.

/s/ Henry A. Mentz
United States District Judge

[Filed Aug. 12, 1993]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 93-0173

SECTION "I"

MAG. DIV. 4

THE TRAVELERS INSURANCE COMPANY,
Plaintiff

versus

ST. JUDE HOSPITAL OF KENNER, LOUISIANA, INC.,
Defendant

AMENDED JUDGMENT

Considering this Court's May 20, 1993 Order and Reasons granting the Travelers Insurance Company's motion for summary judgment, the failure of defendant, St. Jude Hospital of Kenner, La., Inc. to identify property of the St. Jude Medical Office Building, [a] Limited Partnership which may be "discussed" as requested by the May 20 Order, this Court's July 23, 1993 Order and Reasons denying St. Jude Hospital of Kenner, La., Inc.'s motion for reconsideration of the May 20 Order and the Consent Motion to Correct Clerical Error in Judgment,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Judgment be, and the same hereby is rendered in favor of the Travelers Insurance Company, the plaintiff in this action, and against the defendant, St. Jude Hospital of Kenner, La., Inc., without benefit of discussion, for any and all damages, interest and other obligations, indebtedness or relief owed to the Travelers Insurance Company by the St. Jude Medical Office Build-

ing, [a] Limited Partnership pursuant to the Amended Judgment entered December 3, 1992 in the action entitled "Travelers Insurance Company v. St. Jude Hospital of Kenner, La., Inc., et al" Civil Action NO. 90-1983 c/w No. 90-2601, and for all costs of this proceeding.

New Orleans, Louisiana, this 11th day of August, 1993.

/s/ Henry A. Mentz
United States District Judge

UNITED STATES DISTRICT COURT
E.D. LOUISIANA

Civ. A. No. 93-0173

SECTION: "I" (2)

THE TRAVELERS INSURANCE COMPANY

v.

ST. JUDE HOSPITAL OF KENNER, LOUISIANA, INC.

ORDER AND REASONS

Before the Court are the motions of defendant St. Jude Hospital for new trial, alteration and amendment of judgment, and to vacate judgment. A hearing [1] was held August 25, 1993, and supplemental memoranda were filed subsequent to the hearing. Upon consideration of the argument of counsel, the memoranda, the record, and the law, the Court DENIES the motions as follows:

On May 20, 1993, this Court entered Order and Reasons granting the motion for summary judgment of Travelers Insurance Company (Travelers) and denying the cross motion for summary judgment of St. Jude Hospital of Kenner, La., Inc. (SJH). Because SJH had made no effort to identify assets of the St. Jude Medical Office Building Limited Partnership (the partnership), the Court

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[1] **The hearing on August 25, 1993 was held instead of a status conference convened by the Court's minute entry of August 19, 1993.**

at that time ordered SJH to identify property of the partnership which may be discussed. On June 3, 1993, SJH filed a document entitled "List of partnership property which may be "discussed", stating that pursuant to order of the Court, it does "hereby list, identify and describe all partnership property of [the Partnership], which may be "discussed." The list was as follows:

> 1. A cause of action for damages pending before the 24th Judicial District Court of the State of Louisiana, Division "O", titled "St. Jude Medical Office Building Limited Partnership v. City Glass and Mirror, Inc. et al" and numbered 358-113, being the same cause of action which has been seized by The Travelers Insurance Company pursuant to a writ of fieri facias issued by this Court in Civil Action No. 90-1983 on the docket of this Court.
>
> 2. All of the movable property described by paragraph 15 of the amended judgment of this court in Civil Action No. 90-1983; being the same movable property seized by the Travelers Insurance Company pursuant to a writ issued by this court in Civil Action No. 90-1983 on the docket of this Court.

On June 8, 1993, Travelers filed an "Opposition of Travelers Insurance Company to the list of partnership property which may be discussed." With numerous exhibits attached, the opposition demonstrated in detail the deficiencies of SJH's list as well as SJH's failure to comply with the security deposit requirement. SJH did not reply to Travelers opposition nor did it take any other action regarding the discussion.[2]

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[2] SJH filed its motion to reconsider on June 1, and its List on June 3, 1993. Travelers filed its Opposition to the List on June 8. The Court ruled on the motion to reconsider July 23, 1993 and judgment was entered July 30, 1993. It was not until August 9, 1993 that SJH raised any issue whatsoever of the need for a hearing regarding the discussion.

SJH had, however, previously filed a motion for reconsideration of the May 20th Order which the Court denied July 23, 1993. At the request of the Court, counsel for Travelers prepared a draft judgment, a copy of which was sent to counsel for defendant. On July 30, 1993, the Court entered judgment as follows:

> Considering this Court's May 20, 1993 Order and Reasons granting the Travelers Insurance Company's motion for summary judgment, the failure of defendant, St. Jude Hospital of Kenner, Louisiana Inc., to identify property of the St. Jude Medical Office Building, A Limited Partnership which may be "discussed" as requested by the May 20 Order, and this Court's July 23, 1993 Order and Reasons denying St. Jude Hospital of Kenner, Louisiana, Inc.'s motion for reconsideration of the May 20 Order,
>
> IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Judgment be, and the same hereby is rendered in favor of the Travelers Insurance Company, the plaintiff in this action, and against the defendant, St. Jude Hospital of Kenner, Louisiana, Inc., without benefit of discussion, for any and all damages, interest and other obligations, indebtedness or relief owed to Travelers Insurance Company by the St. Jude Medical Office Building, A Limited Partnership pursuant to the Amended Judgment entered December 3, 1992 in the action entitled "Travelers Insurance Company v. St. Jude Hospital of Kenner, Louisiana, Inc., et al" Civil Action No. 90-1983 c/w 90-2601, and for all costs of this proceeding.
>
> New Orleans, Louisiana, this 30th day of July, 1993.

On August 9, 1993 SJH filed a motion for new trial or to alter judgment, which it has subsequently supple-

mented with a motion to vacate judgment. SJH argues [3] that 1) because suit was filed in federal court, discussion pleadings are to be governed exclusively by Federal Rule of Civil Procedure 8; that 2) if La.C.C. Art. 2817 is controlling, it does not require compliance with La. C.C.P. 5155; and that further 3) if La.C.C.P. Article 5155 is indeed controlling, SJH is entitled to a prejudgment hearing on its compliance therewith. Each of these arguments is without merit.

F.R.C.P. 69 *Execution* provides:

> (a) In General. Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held.

F.R.C.P. 64. *Seizure of Person and Property* provides:

> At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held . . . The remedies thus available include arrest, attachment, garnishment, replevin, sequestration, and other corresponding or equivalent remedies, however designated and regardless of whether by state procedure the remedy is ancillary to an action or must be obtained by an independent action.

---

[3] The Court agrees that Art. 3045 eliminating the benefit of discussion for sureties does not apply to partners.

The plea of discussion is a procedure which directs the manner, indeed the order in which judgment is executed against a partner vis-a-vis its partnership. It clearly falls within the parameters of F.R.C.P. Rules 64 and 69 and thus is governed by state law. As a consequence, the Court must adhere to the requirements outlined in La. C.C.P. 5155, addressing discussion and security for costs of executing judgment.

In its Order of May 20 the Court stated that SJH "must properly plead discussion before being entitled to avail itself of its benefits." The Court then pointed the defendant directly to the provisions with which it had to comply noting that "Louisiana's codal articles on discussion require that:

> In pleading discussion, the secondary obligor shall:
>
> (1) Point out by a description sufficient to identify it, property in the state belonging to the primary obligor, or otherwise subject to discussion, which is not in litigation, is not exempt from seizure, is free of mortgages and privileges, and is worth more than the total amount of the judgment or mortgage; and
>
> (2) Deposit into the registry of the court, for the use of the creditor, an amount sufficient to defray the costs of executing the judgment or enforcing the mortgage against the property discussed.
>
> La.Code of Civ.Proc. art. 5155."

The Court need not have elaborated further as to what was required to properly plead discussion.

The Court noted however, that SJH "has made no effort to identify assets of the partnership that can be executed on by Travelers" and gave SJH 15 days in which to do so, or "judgment shall be entered against SJH without benefit of discussion." Clearly, by so ordering the Court was not decreeing that SJH need not properly

plead discussion nor deposit security to cover costs. The Court was merely setting a deadline to patently overworked and protracted litigation.

Defendant argues that it should have had prejudgment notice of the Court's determination of whether its defense of discussion factually satisfied the applicable legal requirements. It is inconceivable SJH could have had more explicit notice. In its Order of May 20, the Court spelled out in plain English the description and security requirements of Art. 5155, allowing 15 days to comply.

Yet to date, Defendant SJH has failed to deposit security to defray costs into the registry of the Court. Indeed, SJH maintains it need not, arguing La.C.C. Art. 2817 makes no such requirement. Defendant is misguided.

La.C.C. Art. 2817 provides:

> A partnership as principal obligor is primarily liable for its debts. A partner is bound for his virile share of the debts of the partnership but may plead discussion of the assets of the partnership.

In the Revision Comments of 1980 to Art. 2817, section (d) specifically provides that "a partner's right of discussion is governed by . . . Code of Civil Procedure Article 5155."

Defendant's position is untenable, as repeatedly held by Louisiana courts for well over a century. *Robechot v. Folse*, 11 La. 133 (La. 1837) (where the court ruled the plea of discussion was correctly overruled "as there was no actual tender of any specific sum to meet the expenses of the discussion"[4]); *Thompson-Ritchie Grocery Co. v. Cary*, 17 La.App. 270, 135 So. 707 (1931) (where the court held that a plea of discussion "*need not be examined on its merits* as [defendant] did not in any manner comply with the law on this subject . . ., which re-

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[4] 11 La. at 135[.]

quired that specific property be designated for discussion, and that the necessary funds be provided" [5]).

In the instant case, the record clearly shows that defendant SJH has failed to deposit any amount into the registry of this Court to defray the costs of execution. The Court need not have interpreted an iota of defendant's list to draw such a conclusion. Neither need the Court hold a hearing to illuminate the issue. Defendant was noticed of the Court's concern as to this requirement by its Order of May 20. And the record, to this day [6], plainly reflects that defendant has failed to comply with section (2) of Article 5155, requiring a deposit into the Court's registry. Contrary to SJH's contention, the holdings of *Robechot*, and more particularly of *Thompson-Ritchie*, apply to the precise circumstances of this case.

At the hearing on August 25, 1993, SJH conceded that the Court might well draw the same conclusion were the judgment vacated and a prejudgment hearing held to argue whether SJH had properly plead [*sic*] discussion. SJH nevertheless wants the hearing, it insisted, in order to build its record for appeal. SJH cites no authority for its right to a hearing, which the Court finds unconvincing in light of *Thompson-Ritchie*.

As to its argument for building a record on appeal, the Court is appalled that SJH should now stand and cry foul. What conceivably could SJH introduce to refute a record which *already* contains *incontrovertible* evidence that the Liljeberg entities are *simultaneously* 1) represent-

---

[5] 135 So. at 709. There is further authority that "the plea of discussion can be made but once." *Hill, McLean & Co. v. John A. Miller*, 7 La. Ann. 621, 623 (1852) [.] The Court was accommodating defendant to allow amplification of its initial answer pleading discussion.

[6] Having had a hearing on August 25, 1993, SJH still erroneously holds the position that La.C.C. Art. 2817 does not require compliance with La.C.C.P. Art. 5155.

ing to this Court that the movables[7] are owned by the Partnership, 2) representing to the Bankruptcy Court these same movables are owned by Liljeberg Enterprises, Inc. and 3) representing to the Fifth Circuit Court of Appeals that a previous finding of this Court, that the movables *are* owned by the partnership, was clearly erroneous![8] See exhibits to Travelers' opposition to the list and to Travelers' opposition to this motion to alter highlighting transcripts, depositions, and pleadings of SJH to this effect.

A superficial reading of these exhibits illustrates the recklessness with which defendants have constructed their allegations, but such an exercise would nevertheless require examination of the record, delving[9] deeper than the pleadings. Hardly fit grist for due process, such an exercise was totally unnecessary to the Court's finding.

The Court found that SJH further failed to comply with La.C.C.P. Art. 5155(1), again from the face of the pleadings alone. From the very language employed, a cursory view of SJH's list reveals the assets listed to be in litigation and not free of mortgages. Furthermore, the list fails to demonstrate the worth of the assets to exceed the total amount of the judgment, all in violation of Art. 5155(1). Fortunately, with such conflicting sworn evidence before it, the Court need not have reached a determination of ownership, hardly public and notorious. In sum, SJH has failed to identify property of the partnership which may be discussed, as requested by the Order of May 20. The

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[7] [D]esignated as Item # 2 of SJH's list.

[8] Indeed it appears that SJH has elevated the meaning of movables to a unique species of fungible. Perhaps after all a hearing would have been the proper forum for SJH to introduce such a novel argument.

[9] [A]ssuming for the moment the Court could eradicate from its memory knowledge of the basis for appeal of its decision to the Fifth Circuit[.]

judgment of the Court of June 30, 1993, was properly rendered.

It is an elementary principle of the contract of suretyship, that the creditor ought not to be subjected to a troublesome, difficult, and protracted discussion. *Hill, McLean & Co. v. John A. Miller*, 7 La. Ann. 621, 623 (1852)[10]. To the extent the Court may have been willing to vacate its Judgment at the request of SJH, this option was foreclosed by the bankruptcy proceedings commenced by SJH within days of Travelers' recordation of the judgment. Were the court to vacate its judgment, Travelers would lose its secured position for a meaningless exercise of procedural handwashing.

Nevertheless, inadvertently omitted from its July 23 order was the Court's ruling on defendant's plea of discussion, to wit,

> Inasmuch as SJH's Answer and its List of Partnership Property which may be Discussed do not on their face comply with the requirements of La.C.C.P. Article 5155, SJH has failed to identify property which may be discussed or to deposit security with the Court to defray costs of execution, such that judgment shall be entered against SJH without benefit of discussion, as stated in the Court's Order of May 20.

In light of this error and pursuant to F.R.C.P. 60(a) and 61, the Court on its own initiative orders this omission to be rectified and the order to be amended accordingly.

In view of the foregoing,

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[10] "Of the slaves, the description is totally deficient; and admitting the plantation to have been well known, and the possession of the defendant, public and notorious, we can not hold the description in the plea, to have been sufficient to maintain the right of discussion, claimed by the defendant." 7 La. Ann. at 624.

1. IT IS ORDERED that defendant SJH's motion for new trial or to alter judgment is DENIED;

2. IT IS FURTHER ORDERED that defendant SJH's supplemental motion for new trial is DENIED;

3. IT IS FURTHER ORDERED that defendant SJH's second supplemental motion for new trial, alteration, and amendment of judgment, and to vacate judgment is DENIED.

4. IT IS FURTHER ORDERED that the Order and Reasons of July 23, 1993, be amended to include the following sentence:

> Inasmuch as SJH's Answer and its List of Partnership Property which may be Discussed do not on their face comply with the requirements of La.C.C.P. Article 5155, SJH has failed to identify property which may be discussed or to deposit security with the Court to defray costs of execution, such that judgment shall be entered against SJH without benefit of discussion, as stated in the Court's Order of May 20.

5. IT IS FURTHER ORDERED that the hearing set for September 8, 1993, is hereby CANCELLED, as per previous oral notification.

New Orleans, Louisiana, this 29th day of September, 1993.

/s/ Henry A. Mentz
United States District Judge

[Filed Nov. 23, 1994]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-3731

TRAVELERS INSURANCE COMPANY,
Plaintiff-Appellee,
versus
ST. JUDE HOSPITAL OF KENNER, LOUISIANA, INC.,
Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) FOR REHEARING EN BANC

(November 23, 1994)

Before HIGGINBOTHAM, JONES, and BARKSDALE, Circuit Judges.

PER CURIAM:

(✓) The Petition(s) for Rehearing is (are) DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (FRAP and Local Rule 35) the Suggestion(s) for Rehearing En Banc is (are) also DENIED.

ENTERED FOR THE COURT:

/s/ Rhesa H. Barksdale
United States Circuit Judge

STATUTORY PROVISIONS INVOLVED

La. Code Civ. Proc. art. 737. Partnership; partners

A partnership has the procedural capacity to be sued in its partnership name.

The partners of an existing partnership may not be sued on a partnership obligation unless the partnership is joined as a defendant.

La. Civ. Code art. 2817. Partnership debts; liability

A partnership as principal obligor is primarily liable for its debts. A partner is bound for his virile share of the debts of the partnership but may plead discussion of the assets of the partnership.

Supreme Court, U.S.
FILED
APR 6 1995
OFFICE OF THE CLERK

No. 94-1411

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

ST. JUDE HOSPITAL OF KENNER, LOUISIANA, INC.,
Petitioner,

v.

TRAVELERS INSURANCE COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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BEST AVAILABLE COPY

QUESTION PRESENTED

In view of Louisiana partnership law and the clear mandate of the doctrine of *res judicata,* about which the courts of appeal are not in conflict, whether *res judicata* bars a judgment creditor from asserting a subsequent collection suit against the general partner of a Louisiana partnership for payment of a judgment owed by the partnership.

STATEMENT UNDER RULE 29.1

In accordance with Rule 29.1 of the Supreme Court, respondent, The Travelers Insurance Company, advises that its parent, The Travelers Corporation, has issued shares of common and preferred stock to the public. Respondent further advises that it has no subsidiaries whose stock is publicly traded.

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No. 94-1411

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

ST. JUDE HOSPITAL OF KENNER, LOUISIANA, INC.,

Petitioner,

v.

TRAVELERS INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

The Travelers Insurance Company ("Travelers" or "Respondent"), through its undersigned counsel, respectfully requests this Court to deny the petition for a writ of certiorari submitted by petitioner, St. Jude Hospital of Kenner, La., Inc. ("St. Jude Hospital" or "Petitioner").

STATEMENT OF JURISDICTION

28 U.S.C. §1254(1) confers jurisdiction on this Court. The jurisdiction of the United States Court of Appeals for the Fifth Circuit was invoked pursuant to 28 U.S.C. §1291. The jurisdiction of the United States District Court for the Eastern District of Louisiana was invoked under 28 U.S.C. §1332(a)(1).

STATUTORY PROVISIONS INVOLVED

This petition involves issues of Louisiana partnership law and requires interpretation of two Louisiana codal provisions, article 737 of the Louisiana Code of Civil Procedure and article 2817 of the Louisiana Civil Code; both are included in Respondent's appendix.

STATEMENT OF THE CASE

A. Factual Background

This is a collection suit brought to compel a general partner to pay the debts of its limited partnership.

St. Jude Hospital was founded by John and Robert Liljeberg to develop an acute care hospital in Kenner, Louisiana in 1983. Needing to provide office space for the hospital physicians, St. Jude Hospital formed a Louisiana limited partnership, the St. Jude Medical Office Building Limited Partnership (the "Partnership"), and donated property adjacent to the hospital to the Partnership for the construction of the St. Jude Medical Office Building (the "MOB"). In consideration of that transfer, St. Jude Hospital was named the Partnership's sole general partner.

In 1985, Travelers loaned the Partnership $25,000,000. Of that loan amount, approximately $19,000,000 was

used to pay the construction lender and the balance of $6,000,000 was retained by the Partnership. To secure the debt, the Partnership granted a real and chattel mortgage that encumbered the MOB, its improvements (including tenant improvements), and all "corporeal movables"—personal property of any type owned by the Partnership and located at the MOB. The Partnership also granted to Travelers an assignment of all of the Partnership's rights under any leases of space in the MOB. Included among the assigned leases were two with affiliates of St. Jude Hospital – Liljeberg Enterprises ("LEI") and Krown Drugs, Inc. ("Krown").

During the next five years, the Partnership used Travelers' funds to make loans to its affiliates, LEI and Krown, and its insiders, the Liljebergs, and to pay a portion of the interest owed to Travelers. Although the Partnership repeatedly represented to Travelers that it timely collected all rents, the Partnership permitted Krown and LEI to avoid payment of rent owed under the leases assigned to Travelers. By early 1990, the Partnership had exhausted the funds loaned by Travelers, and the Partnership quickly defaulted in repayment of the loan. Travelers demanded payment of the loan. The Partnership, St. Jude Hospital and the Liljebergs responded with threats to render the MOB uninhabitable by terminating water service and blocking its sewerage and storm drainage system, which ran under neighboring property owned by St. Jude Hospital. When Travelers indicated that it would pursue foreclosure, the Partnership, Liljebergs and LEI responded by stripping tenant improvements from the MOB.

B. The Partnership Litigation

Faced with the destruction of its collateral and the Partnership's refusal to cure its default, Travelers instituted a diversity action in the United States District Court for the Eastern District of Louisiana against the Partnership, St. Jude Hospital, LEI, Krown, and the Liljebergs (the "Partnership Litigation"). Travelers' suit arose from five discrete sets of operative facts; only three of these involved St. Jude Hospital, against whom Travelers sought a judgment of primary, individual liability. Travelers did not seek a judgment against St. Jude Hospital based on its status as general partner of the Partnership.

The first set of operative facts underlying Travelers' Claims concerned the Partnership's March 1990 default of the promissory note executed in favor of Travelers in October of 1985 and secured by the real and chattel mortgage executed by the Partnership. The second set of operative facts related to Travelers' exercise of its rights under the leases between the Partnership and its affiliates that had been assigned to Travelers. The third set of operative facts referenced the Liljebergs' threats to terminate water and sewerage service to the MOB in the spring of 1990. The fourth set of operative facts arose from the removal of furniture, fixtures and equipment from the MOB in late May, 1990. The final transaction involved environmental damage to the real estate encumbered by Travelers' mortgage.

While some of the transactions involved the same parties, they were not otherwise related in time or substance.[1] Travelers named St. Jude Hospital as a party

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[1] **Accordingly, because the transactions did not arise out of the same facts, Travelers could have instituted five separate suits.**

[footnote continued]

concerning claims involving the third, fourth and fifth transactions. These claims arose solely from St. Jude Hospital's actions performed in its individual capacity and for which it was primarily liable.

In its second amended and restated complaint in the Partnership Litigation, Travelers named St. Jude Hospital as a defendant in nine counts.[2] First, Travelers requested an injunction against St. Jude Hospital and other defendants to prevent their blocking the water and sewerage pipes running under St. Jude Hospital's property.[3] Second, Travelers asserted that St. Jude Hospital, as owner of the property adjacent to the MOB, was obligated to grant a servitude for water and sewerage running from the MOB across St. Jude Hospital's property to the public main.[4] Third, Travelers charged St. Jude Hospital and the other defendants with negligent or intentional misrepresentation for failing to advise Travelers that a servitude had never been recorded properly.[5] Fourth, Travelers asserted that St. Jude

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Instead, for purposes of judicial economy and pursuant to Federal Rules of Civil Procedure 18(a) and 20(a), Travelers asserted in one suit all of its claims based upon those five transactions.

[2]The second amended complaint superseded both the restated and original and first amended complaint. Like the second amended complaint, those complaints neither asserted any claim against St. Jude Hospital relating to rent due from LEI or Krown nor asserted any claim seeking to hold St. Jude Hospital secondarily liable for the Partnership's debts.

[3]Count Two, second amended complaint. A copy of the second amended complaint is attached as Exhibit 1 to the record excerpts filed by Travelers with the court of appeals and lodged with the Clerk of the Supreme Court.

[4]Count Three, second amended complaint (Travelers' record excerpts, Exhibit 1).

[5]Count Four, second amended complaint (Travelers' record excerpts, Exhibit 1).

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Hospital and the other defendants breached their duty of good faith by failing to grant Travelers the water and sewerage servitude.[6] Fifth, Travelers requested that the trial court compel St. Jude Hospital and other defendants to grant the servitude in order to cure any deficiency in Travelers' mortgage.[7] Sixth, Travelers requested an injunction against St. Jude Hospital and other defendants to prevent removal of various furniture, fixtures and equipment from the MOB.[8] Seventh, Travelers alleged that St. Jude Hospital and other defendants were liable for damages resulting from the removal of the items from the MOB.[9] Eighth, Travelers asserted that St. Jude Hospital and the other defendants acted jointly to impair Travelers' collateral by denying the servitude and participating in the removal of furniture, fixtures and equipment from the MOB and that they should be held liable for payment of the debt secured by the collateral.[10] Finally, Travelers asserted that St. Jude Hospital and other defendants should pay to repair environmental damage to the MOB; St. Judge Hospital was joined in this count because the source of the damage, a leaky diesel fuel tank, was located on property owned by St. Jude Hospital.[11]

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[6]Count Five, second amended complaint (Travelers' record excerpts, Exhibit 1).

[7]Count Six, second aamended complaint (Travelers' record excerpts, Exhibit 1).

[8]Count Eight, second amended complaint (Travelers' record excerpts, Exhibit 1).

[9]Count Ten, second amended complaint (Travelers' record excerpts, Exhibit 1).

[10]Count Eleven, second amended complaint (Travelers' record excerpts, Exhibit 1).

[11]Count Twelve, second amended complaint (Travelers' record excerpts, Exhibit 1).

Travelers brought all of its claims against St. Judge Hospital in its primary, individual capacity. The claims arose out of either St. Jude Hospital's ownership of the property adjacent to the MOB or its participation in the removal of furniture, fixtures and equipment from the MOB. Travelers mentioned in the second amended complaint St. Jude Hospital's status as the general partner of the Partnership only to illustrate the relationship between the defendants and to show that the defendants were under common control; Travelers made no reference to St. Jude Hospital's secondary liability for the debts of the Partnership. Petitioner's status as a general partner did not serve as a foundation for recovery under any cause of action.

The exhaustive pretrial order in the Partnership Litigation did not address the issue of St. Jude Hospital's secondary liability for the debts of the Partnership. The pretrial order in the Partnership Litigation consisted of several hundred pages.[12] The parties jointly listed one hundred-sixty seven (167) contested issues of fact and sixty-three (63) contested issues of law. Of the contested issues of fact, only ten (10) related to St. Jude Hospital. Each of these concerned whether St. Jude Hospital damaged Travelers by denying use of the servitude or by participating in the removal of furniture, fixtures and equipment from the MOB.[13] Nowhere in the pretrial

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[12] Pretrial order attached as Exhibit "A" to Travelers' reply memorandum filed with trial court. A copy of the pertinent portions of the pretrial order is attached as Exhibit 2 to the record excerpts filed by Travelers with the court of appeals and lodged with the Clerk of the Supreme Court.

[13] Pretrial order, ¶s 2, 7, 12, 17, 22, 27, 32, 41, 121, and 165.

order did Travelers seek to hold St. Jude Hospital secondarily liable for the Partnership's debts.

At the close of Travelers' case, the trial court determined that there was insufficient evidence that St. Jude Hospital had participated in the removal of items from the MOB and that its property was encumbered by a servitude and granted judgment as a matter of law in favor of Petitioner as to those claims. Consequently, the interrogatories ultimately submitted to the jury contained no questions regarding St. Jude Hospital's liability under any theory.[14] Travelers' case against the other defendants then went to the jury, which awarded a multimillion dollar verdict in Travelers' favor. The court of appeals affirmed the judgment in favor of Travelers other than to hold that Travelers was entitled to an additional award of attorneys' fees.

C. The Hospital Litigation

1. The district court proceedings

Efforts to collect from the Partnership proved fruitless. On January 15, 1993, Travelers sued St. Jude Hospital, seeking payment of the judgment against the Partnership in the Partnership Litigation (the "Hospital Litigation").[15]

Both Travelers and St. Jude Hospital moved for summary judgment. Travelers based its motion upon

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[14] Indeed, both Travelers and St. Jude Hospital understood that Petitioners' secondary liability was not at issue: Neither party submitted proposed jury interrogatories or jury charges relating to Petitioner's secondary liability.

[15] As the lone general partner of the Partnership, St. Jude Hospital was solely responsible for the debt of the Partnership.

established Louisiana law requiring a general partner to pay the debts of its partnership; conversely, St. Jude Hospital alleged that *res judicata* had extinguished Travelers' claim. Specifically, St. Jude Hospital claimed that the doctrine required Travelers to assert in the Partnership Litigation all of its claims against St. Jude Hospital, including any secondary claim for payment of the Partnership's debts.

On May 18, 1993, the district court granted summary judgment in favor of Travelers and denied St. Jude Hospital's motion for summary judgment, holding the *res judicata* argument to be without merit.[16] The court concluded that *res judicata* did not apply to Travelers' suit:

> This Court concludes that the claim of Travelers against SJH [the St. Jude Hospital] to enforce against SJH the judgment debt of the Partnership is not barred by *res judicata.* The principal test for comparing causes of action is drawn from §24 of the Restatement of Judgments 2d, which provides that:
>
> > . . . the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.
>
> *Nilsen v. City of Moss Point, Miss.*, 701 F.2d 556 (5th Cir. 1983). Travelers' rights against SJH arose only when Travelers obtained judgment against the Partnership and the Partnership, in turn, was unable

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[16] Petitioner's Appendix, pp. 9a-14a. (hereinafter, "P.App.").

> to pay the judgment. The "transactional test" set forth in *Nilsen*, therefore, does not preclude Travelers' claim against SJH.

P.App. 12a. The district court further concluded that St. Jude Hospital's presence as a defendant in the Partnership Litigation did not affect Travelers' right to pursue St. Jude Hospital for a claim based on secondary liability. The Court stated in that vein:

> SJH's presence as a party in the litigation against the Partnership, however, does not change the secondary nature of the claim asserted herein by Travelers. The jury that found the Partnership liable to Travelers was not asked to decide whether SJH would be liable to Travelers, whether primarily or secondarily, for that same debt based on its status as general partner of the Partnership. That SJH was not made a part of the judgment in the initial litigation does not relieve it of its obligations as partner. That matter was not before the jury and is not now precluded.

P.App. 12a.

St. Jude Hospital sought reconsideration of the district court's ruling on the *res judiciata* issue. On July 21, 1993, Judge Mentz denied St. Jude Hospital's motion for reconsideration:

> The Court by its May 18th order rejected [the *res judicata*] argument, and by this ruling does so again. SJH has evidently missed the point . . . These arguments have been considered and reconsidered by this Court for the last time.

P.App. 16a, 19a.

The district court discussed in detail that the Partnership Litigation arose out of different operative facts than those at issue in the Hospital Litigation. The court reasoned as follows:

> Thus far allusive [*sic*] to SJH is the point which defeats SJH's argument: SJH may have been a party to and an active participant in both the instant case and the previous lawsuit, but the nucleus of operative facts, the common core of facts, are entirely different for each case.
>
> In the previous lawsuit, the thrust was who *did* or *failed to* do what. As stated by SJH at page 9 of its Consolidated Memorandum,
>
> > The 1990 suit was filed against SJH as the sole general partner of [the Partnership] and was based on intentional and negligent acts and omissions concerning among other claims, breach of contract to provide a servitude, the failure to collect rental payments, and actionable waste.
>
> Clearly, the previous lawsuit sounds in tort, totally unlike the instant one which, no matter how it is dressed up, is fundamentally a collection suit. The issues and the facts in the present case have as their core who *owns* what, who possessed it and when.

P.App. 17a (italics in original) (footnote omitted).

Additionally, the district court explained that St. Jude Hospital's presence in the Partnership Litigation did not support Petitioner's *res judicata* argument, stating

> neither the Court nor the jury [in the Partnership Litigation] decided implicitly or explicitly that a party dismissed from primary liability for damages arising out of tortious acts and omissions was at the same time relieved of a legal obligation to pay a debt derived from its relationship as general partner to the debtor partnership.

P.App. 18a (footnote omitted). Subsequently, on July 30, 1993, the district court entered judgment in favor of Travelers and against St. Jude Hospital holding it liable

for payment of the Partnership's debt to Travelers. P.App. 20a-21a, 22a-23a. The district court denied St. Jude Hospital's motion for a new trial, alteration and amendment of judgment, and vacation of judgment. P.App. 24a-33a. Petitioner then appealed to the United States Court of Appeals for the Fifth Circuit.

2. **The decision of the court of appeals**

The court of appeals properly affirmed the district court. The court of appeals analyzed the central issue in the Hospital Litigation: "Whether both cases involve the same cause of action." P.App. 5a. The court of appeals applied the "transaction test" of the Restatement (Second) of Judgments, which nearly every circuit has accepted as the analytical framework for determining whether the same cause of action was involved, and accepted the commonly held view that "the critical issue is not the relief requested or the theory asserted but whether [the] plaintiff bases the two actions on the same nucleus of operative facts." P.App. 5a. (quoting *Matter of Howe*, 913 F.2d 1138, 1144 (5th Cir. 1990)) (bracketed word added by court below).

Analyzing St. Jude Hospital's *res judicata* defense in the context of Louisiana partnership law, the court of appeals found that

> Louisiana recognizes a partnership as a separate entity; initially, a creditor of a partnership must bring suit against the partnership, but can join the parties in that action. *See* La. Code Civ. Proc. art. 737; *State v. Morales*, 256 La. 940, 240 So.2d 714, 716 n.3 (1970); *Falcon Drilling Co. L.P. v. Transamerica Energy, Ltd. II*, 622 So.2d 745, 747 (La. App. 3d Cir. 1993) (partner may be joined as a party defendant in the original action against the

> partnership). And, under Louisiana's entity theory of partnership, the creditor of a partnership should seek recovery first against the partnership. *See* La. Civ. Code art. 2817; *Koppers Co., Inc. v. Mackie Roofing & Sheet Metal Works*, 544 So.2d 25, 26 (La. App. 4th Cir. 1989) (intent of the law is that recovery be sought first against the primary debtor, the partnership); *see also Federal Deposit Ins. Corp. v. Mmahat*, 960 F.2d 1325, 1328-29 (5th Cir. 1992) (general discussion of actions against the partnership, including a partner's secondary liability), *cert. denied*, ___ U.S. ___ , 113 S.Ct. 1044, 122 L.Ed.2d 353 (1993).

P.App. 5a-6a (footnotes omitted).

The court of appeals noted that St. Jude Hospital "conceded at oral argument that, had it not been a party in the Partnership Litigation, it would have no basis for claiming *res judicata*." P.App. 7a. Referencing St. Jude Hospital's undue focus on identity of parties, the court of appeals found "a distinction without a difference." P.App. 7a. "In essence, it [St. Jude Hospital] seeks to conflate the first (identical parties) and fourth (same cause of action) factors in our *res judicata* analysis." P.App. 7a-8a. The court of appeals found St. Jude Hospital's presence in the Partnership Litigation immaterial in light of Louisiana partnership law.

REASONS FOR DENYING THE PETITION

The legal issues presented by St, Jude Hospital's petition do not warrant the attention of the Court. Contrary to Petitioner's contentions, the court of appeals' decision does not conflict with any other circuit. The Tenth Circuit decision cited by Petitioner, *Lowell Staats Mining Co., Inc. v. Philadelphia Electric Co.*, 878 F.2d

1271 (10th Cir. 1989), is factually inapposite to this case. The court there applied the *res judicata* doctrine to bar a plaintiff's effort to hold a general partner liable for a debt of a putative partnership that had not been sued in the first proceeding. In this case, pursuant to the Louisiana law of partnership, Travelers instituted a collection suit against a general partner for the unsatisfied judgment owed by a partnership whose identity and liability had been established in the first suit. In the context of this Louisiana collection suit, St. Jude Hospital would have the Court elucidate a new doctrine of *res judicata* based on the formalistic, mechanical approach of nineteenth century jurisprudence long ago rejected by this Court. The stiff *res judicata* regime proposed by St. Jude Hospital would upset not only well-established notions of Louisiana partner liability but also the permissive joinder rules of the Federal Rules of Civil Procedure. For these reasons, which Travelers sets forth more fully below, the Court should deny the petition for a writ of certiorari.

I.

THE DECISION OF THE COURT OF APPEALS DOES NOT CONFLICT WITH ANY OTHER COURT OF APPEALS AND WAS MANDATED BY LOUISIANA PARTNERSHIP LAW.

The court of appeals' decision does not conflict with the decision of the Tenth Circuit in *Lowell Staats Mining Co., Inc. v. Philadelphia Electric Co.*, 878 F.2d 1271 (10th Cir. 1989). That case is factually inapposite. Moreover, St. Jude Hospital's infatuation with the doctrine of *res judicata* has caused it to ignore that Louisiana partnership law serves as the foundation for the court of appeals' decision.

A. No Conflict Exists Between The Fifth Circuit's Decision In This Case And The Tenth Circuit's Decision In *Lowell Staats Mining*

St. Jude Hospital offers the Tenth Circuit's decision in *Lowell Staats Mining* to support its contention that the court of appeals' decision creates a conflict among the circuits. Petitioner argues that the Tenth Circuit in that case applied *res judicata* to bar a suit against a partner for the unsatisfied judgment of a partnership. St. Jude Hospital overlooks the fact that the *Lowell Staats Mining* plaintiff failed to establish in the first suit not only the existence of a partnership but also partnership liability. *Lowell Staats Mining* is factually inapposite. The Fifth Circuit and the Tenth Circuit have not collided over this issue.

In *Lowell Staats Mining*, the plaintiff, Staats, had sued and obtained a money judgment against Pioneer Uravan, Inc. ("PUI") for breach of a mining contract. Staats also sued in that action two other entities, Pioneer Corporation ("PC") and Pioneer Nuclear, Inc. ("PNI"), claiming that these corporations were responsible for PUI's liabilities under theories of alter ego, instrumentality, agency, successor corporation, and receipt of fraudulent conveyances. Importantly, Staats did not allege that any of the defendants constituted a partnership entity, and it did not seek to obtain a judgment against PUI, PC, or PNI on any theory of partnership liability. The trial court dismissed PC and PNI on a directed verdict, and the jury awarded Staats a money judgment against PUI. The Tenth Circuit affirmed the trial court's decision except as to prejudgment interest.

Staats' attempts to collect from PUI were unsuccessful, and it commenced a second suit against PC, PNI, and two other entities, Philadelphia Electric Company

("PEC") and Umetco Minerals Corporation ("UMC"). In this second action, Staats raised for the first time a new theory of liability—that PNI and PC, as partners of PUI in a putative partnership, were obligated to pay Staats' judgment against PUI.

The trial court dismissed the claims against PC, PNI, PEC, and Umetco. The trial court stressed that because the plaintiff-judgment creditor had failed to establish the existence of a partnership and to obtain a judgment against the alleged partnership in its primary capacity in the first action, *res judicata* barred it from obtaining a judgment against the alleged partnership and its partners based on that non-existent partnership debt:

> The [original] judgment was not recovered against one or more of several persons jointly indebted upon an obligation. PC and PNI were dismissed from the case, so Staats obtained a judgment against PUI only. Nothing in the [original] complaint or the [original] third-party complaint raised the specter that Staats was suing on a partnership debt or any other joint obligation involving third parties other than PC and PNI. Staats now raises that possibility for the first time [here]. As described elsewhere in this opinion, the attempt is barred by res judicata.

Lowell Staats Mining Co., Inc.v. Philadelphia Electric Co., 660 F. Supp. 809, 815 (D. Colo. 1987), *affirmed*, 878 F.2d 1271 (10th Cir. 1989).

The Tenth Circuit affirmed. Adopting the transactional approach of §24 of the Restatement (Second) of Judgments (1982) to determine what is a "cause of action," and noting Staats' failure to establish the existence and liability of the partnership entity in the first action, the Tenth Circuit stated

> Staats' partnership claims against PEC clearly arise out of the same "transaction" that was the basis of the litigation in [the first case]. In Colorado partners are jointly and severally liable for joint debts of the partnership. . . . Staats really does not dispute this but rather argues that by suing one defendant in [the first case], without alleging a partnership, he still retains his right to sue other alleged partners in a second, independent action. The cases relied upon by Staats, however, presuppose the alleged debt was identified in the first action as a partnership obligation.

878 F.2d at 1279 (citations omitted).

Lowell Staats Mining is factually distinct from this case. In the Partnership Litigation, Travelers named the partnership debtor in the original action and proved (1) the existence of the Partnership, (2) the identity of its sole general partner and (3) the liability of the Partnership. Indeed, St. Jude Hospital does not dispute in its petition for a writ of certiorari that Travelers established these facts in the Partnership Litigation. In contrast, although it could have, *Staats* made no allegations in the first suit of the existence of the putative partnership or the identity of its partners; it only adjudicated PUI's debt individually. Like Staats, Travelers knew of the partnership before trial. Unlike Staats, Travelers treated the debt not as an individual but as a partnership obligation and obtained a judgment against the partnership on that basis. 650 F. Supp. at 815. The parties in the Partnership Litigation, unlike the litigants in *Lowell Staats Mining*, understood that Travelers was suing on a partnership debt. *Id.* Travelers, unlike Staats, did not raise for the first time in this case the existence

of the partnership or of its debt. *Id. Lowell Staats Mining* does not contradict the holding of the court of appeals.[17]

B. Louisiana Partnership Law Entitled Travelers To Obtain A Judgment Against The Partnership Before Filing Suit Against St. Jude Hospital

Petitioner's rush to have this Court establish a fixed, inflexible doctrine of *res judicata* stampedes another, more established principle, federalism. St. Jude Hospital completely ignores the fact that, as a matter of state law in this diversity case, Travelers was entitled to obtain a judgment against the Partnership prior to instituting an action against St. Jude Hospital to collect on the Partnership's debt. St. Jude Hospital's discussion of *res judicata* notably omits any reference to this controlling authority.

As a matter of Louisiana law, Travelers was entitled to obtain a judgment against the Partnership before filing suit against St. Jude Hospital to compel payment of the Partnership's debt. The Louisiana Civil Code, the Louisiana Code of Civil Procedure, and the decisions of Louisiana federal and state courts definitively establish that a claimant may obtain a judgment against a partnership, and, should he be unable to collect from the partnership, file a second suit against its general partners. Although a claimant may elect to name the partnership and partners in a single suit, he is not required to do so. Indeed, even should a plaintiff file a single action, he may not

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[17] Although Petitioner ignored a discussion of the Colorado law of partnership in its petition, the Colorado law of partnership liability and civil procedural rules contemplate and authorize collection suits against partners subsequent to the original action establishing partnership liability. C.R.S.A. §13-50-105. *See, e.g., Resolution Trust Corp. v. Teem Partnership*, 835 F. Supp. 563 (D. Colo. 1993).

collect from the partners until the partnership assets are exhausted. *Res judicata* does not bar a second suit against partners.

The Louisiana Court of Appeal, Fourth Circuit, recently addressed these issues. In *Koppers Co., Inc. v. Mackie Roofing & Sheet Metal*, 544 So.2d 25 (La. App. 4th Cir. 1989), the court forcefully rejected defendants' claim of *res judicata* in an action seeking to hold partners liable for a judgment in a prior suit against a partnership. Although the partners were involved in the partnership's defense to the prior suit, there was neither a requirement to join the partners in that litigation nor any bar to pursuing them in a second and separate action. The Louisiana Fourth Circuit concluded as follows:

> Code of Civil Procedure Article 737 . . . is in accord with Civil Code Article 2817 which provides that "[a] partnership as principal obligor is primarily liable for its debts," and that the partner, who is secondarily liable, may plead discussion of the partnership assets. The clear intent of both articles is that a partnership creditor must first exhaust his rights against the partnership before he proceeds against the individual partners. However, there is no requirement that the partners be named as defendants in the suit against the partnership. Article 737 requires only the converse.
>
> Prior to filing the instant suit, [plaintiff] had already obtained a judgment against the partnership. Their present suit seeks redress against the individual partners for their virile share of the partnership debt. Although, as a practical matter, it may have been more economical and expedient to have joined the partners in the first suit, the intent of the law has been satisified in that recovery was first sought against the primary debtor, the partnership.

544 So.2d at 26.

Similarly, in *Stone v. Stone*, 293 So.2d 523 (La. App. 4th Cir. 1974), the Louisiana Fourth Circuit rejected a *res judicata* defense by a partner defendant who asserted that a plaintiff was required to name him as a defendant in the original suit. The Fourth Circuit noted that because the partner was only secondarily liable, he may be sued after the plaintiff attempts to enforce a judgment against the partnership. This was not only permissible but desirable because "[t]he individual partner's liability only comes into existence when and if the partnership becomes insolvent." 293 So.2d at 526.

The Fifth Circuit followed these state court decisions to find that an action against the partnership does not bar a subsequent collection suit against the partners. In *Federal Deposit Ins. Corp. v. Mmahat,* 960 F.2d 1325 (5th Cir. 1992), *cert. denied,* ___ U.S. ___ , 113 S.Ct. 1044, 122 L.Ed.2d 353 (1993), the court of appeals recognized that a subsequent claim against a Louisiana partner was not barred by a previous judgment against the Louisiana partnership. Plaintiff, the Federal Deposit Insurance Corporation ("FDIC"), had filed suit against the partnership and one of its partners. FDIC did not name one of the general partners, Duffy; however, he was represented by counsel and actively participated in the suit as well as in settlement discussions. 960 F.2d at 1327. The original suit culminated in a judgment against the partnership and the other general partner. FDIC then sued Duffy for payment of his virile share of the judgment. Duffy argued that claims against him for his virile share should have been raised in the original suit in which he had participated and that the second suit was barred by *res judicata*. The district court sustained that objection and dismissed the case. On appeal, the Fifth Circuit reversed, concluding that, under Louisiana

law, a creditor must first exhaust his remedies against the partnership and only then pursue claims against the partners. The court of appeals decreed that, although a creditor may name the partnership and the partners in a single suit,

> [u]nder the Louisiana law of partnerships, each partner is secondarily liable for his virile share of the partnership debts. The fact that Duffy might have been joined in [the first suit] does not preclude the FDIC judgment against Duffy in a separate action. Since the [the first suit] resulted in a $35 million dollar judgment against Mmahat and M & D [the partnership], the FDIC is entitled to seek Duffy's share of the liability for the judgment.

960 F.2d at 1329 (citation omitted) (footnote omitted).

St. Jude Hospital argues that the decision of the court of appeals ignores this Court's precedent governing *res judicata*. Clearly, this is not the case. As a matter of Louisiana state law, Travelers was free to file a second suit after the Partnership failed to satisfy its debt to Travelers. And Louisiana is not unique.[18]

St. Jude Hospital's discussion of *res judicata* omits any reference to these pivotal Louisiana decisions, which have specifically concluded that a lawsuit against general partners following a final judgment against a partnership

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[18] Other states follow these rules of partner liability in the context of *res judicata* objections. *See, e.g., United States v. Ringley*, 750 F. Supp. 750, 756-7 (W.D. Va. 1990), *affirmed*, 985 F.2d 185 (4th Cir. 1993) (*per curiam*); *Block v. Woodbury*, 211 Ga. App. 184, 185-86, 438 S.E.2d 413, 415 (Ga. App. 1993); *Faber v. Althoff*, 168 Ariz. 213, 220-21, 812 P.2d 1031, 1038-39 (Ariz. App. 1990); *Brinkley, McNerney, Morgan & Solomon v. Community Acres Associates, Ltd.*, 602 Fo.2d 685, 687 (Fla. App. 1992); *Brunsoman v. Seltz*, 414 N.W.2d 547, 550-551 (Minn.App. 1987); *In re Jones*, 161 B.R. 181, 183 (Bankr.N.D.Tex. 1993).

is not barred by *res judicata.* This is telling. Petitioner's discussion also fails to address the fundamental difference in liability between a Louisiana partnership and its partners for debts of the partnership – a distinction that is fatal to St. Jude Hospital's claim of *res judicata.*

The Partnership is organized under the laws of the State of Louisiana. Under Louisiana law, a partnership is a distinct legal entity with the right to sue or be sued in its own name. A partnership may incur debts in its own name, and it is primarily liable for the payment of those debts. The partners are secondarily liable for those debts, but they may not be compelled to pay the partnership's debts until the partnership is liquidated or its assets are exhausted. 544 So.2d at 26. Indeed, under Louisiana Civil Code article 2817, a partner sued for a partnership debt is entitled to plead discussion and compel the partnership creditor to exhaust his remedies against the partnership before he proceeds against the partner. The revised comments to article 2817 state this:

> This article sets forth the rule that creditors must look to the partnership first for the debts of the partnership. The partners are only secondarily liable . . . A third person may sue the partnership and the partners at the same time . . . but can recover against a partner who has properly pleaded discussion only if the partnership's assets have been exhausted or the partnership has been dissolved.

Comment to La. Civ. Code art. 2817.

That is precisely what has occurred in this case. Travelers obtained a judgment against the Partnership, sought to execute that judgment and only then filed suit against the general partner, having determined the Partnership could not satisfy its debts.

II.

THIS COURT SHOULD NOT RETREAT TO THE MECHANICAL RULES ADVOCATED BY PETITIONER AND INTERVENE IN THIS LOUISIANA COLLECTION SUIT.

St. Jude Hospital petitions the Court for "clarification" of the doctrine of *res judicata* and, presumably, reversal of the judgment of the court of appeals. St. Jude Hospital argues that the doctrine is not clear and focuses on the lower courts' supposed misplaced reliance on the transactional test espoused by Section 24 of the Restatement (Second) of Judgments (the "Restatement"). St. Jude Hospital argues that the pragmatic considerations inherent in that analysis have aggravated this lack of clarity concerning the application of the *res judicata* doctrine. These contentions are without support. The *res judicata* doctrine is by its very nature abstract. It warrants the flexible standards espoused by the Restatement and adopted by nearly every Circuit. The Court should not retreat to the anachronistic, formalistic rules espoused by St. Jude Hospital.

The *res judicata* jurisprudence of this Court is well-developed. "There is little to be added to the doctrine of *res judicata* as developed in the case law of this court." *Federated Department Stores, Inc. v. Moitie,* 452 U.S. 394, 398 (1981). *Res judicata* ensures the finality of decisions. Under that doctrine, "a final judgment on the merits bars further claims by parties or their privies based on the same cause of action." *Montana v. United States,* 440 U.S. 147, 153 (1979). "*Res judicata* prevents litigation of all grounds for, or defenses to, recovery that was previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding." *Brown v. Felsen,* 442 U.S. 127, 131 (1979).

Res judicata thus encourages reliance on judicial decisions, bars vexatious litigation, and frees the courts to resolve other disputes. *Id.* However, "*res judicata* shields the fraud and the cheat as well as the honest person. There it is to be invoked only after careful inquiry." *Id.*

Notwithstanding the doctrine's abstract nature and the practicalities of modern litigation, Petitioner would have this Court elucidate a set of rules to govern *res judicata* focused exclusively on claims or issues that "could have been raised." This inquiry ignores *res judicata's* abstract nature and the practical needs of parties in modern complex litigation. A leading commentator reflected on these often conflicting realities:

> As an abstract matter, res judicata doctine presents a particularly delicate balance between the values of clear theory and the need for pragmatic adjustment. On the one hand, clear rules provide important benefits. Res judicata principles as a whole respond to the perception that "[a] lawsuit is not a laboratory experiment for the discovery of physical laws of universal application but a means of settling a dispute between litigants." Clear rules are important if a dispute is to be settled by a single litigation. The clearer the rules, the better the parties are able to rely on the judgment, to measure a sense of repose against it, and to avoid repetitive litigation that tests its limits. On the other hand, many of the abstract rules must be informed by a wise sense of real-world affairs and a healthy skepticism about the capacities of any single litigation to settle the relationships beyond the immediate dispute. Rules that control the matters that must be advanced in the first suit or lost, for example, must take account of the practical needs of the parties and the burdens and distortions entailed by complex litigation . . . .

> One result of this balance between theory and practice is that many rules must be expressed in general terms that identify the purposes and values of preclusion, but do not clearly dictate answers to particular questions.

18 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* §4401, at 3-4 (1981) (footnote omitted).

Uncertainty concerning the application and explanation of the rules of *res judicata* has thus proved unavoidable. *Id.*, §4407 at 49.[19] Despite this uncertain nature, Petitioner would have this Court espouse nineteenth-century black letter precepts of *res judicata.* As one commentator explained, "[c]lassically, as propounded in such seminal 19th-century cases as *Cromwell v. County of Sac* [94 U.S. 351 (1876)], *res judicata* was a doctrine of finality expressed and implemented through a cluster of axiomatic rules of law specific in form, absolute in force, and mandatory in application." Maurice J. Holland, *Modernizing Res Judicata: Reflections on the Parklane Doctrine,* 55 Ind. L.J. 615, 616 (1980) (footnote omitted). "In the matter of the formal or . . . 'mechanical' jurisprudence of the late nineteenth century, the rules of res judicata were thought to embody in themselves every consideration of fairness or justice which judges were entitled to take into account." *Id.* at 617.

The Restatement, in contrast, ushered a marked departure from these mechanical notions. The Restatement assisted in the transition from the formalistic jurisprudence of the late nineteenth and early twentieth cen-

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[19] *See also,* 1B James W. Moore, Jo Desha Lucas & Thomas S. Currier, *Moore's Federal Practice,* ¶0.405[5], at III-12 (2d Ed. 1994) ("The doctrine of res judicata is not a technical rule, but a rule of fundamental repose for both society and litigants").

turies to a more flexible and equitable modern doctrine of *res judicata*. Professor Holland has noted this shift from unyielding application of black-letter rules to the multifaceted analysis and balancing of competing interests contemplated by the Restatement:

> In recent decades, there seems to have developed a *nearly universal agreement* among judges and scholarly commentators alike that res judicata cannot be soundly administered by means of resolute adherence to a battery of self-enclosed rules of the kind so confidently pronounced by Justice Field in *Cromwell v. County of Sac* as constituting the sole and sufficient grounds of decision in cases involving the preclusive effect of judgments.

Id. at 618 (footnote omitted) (italics added).

The Restatement embodies this modern, multifaceted analysis. Section 24 of the Restatement provides a pragmatic test for analyzing the phrase "cause of action." The purpose of Section 24 was to move away from the "primary right" theory of claim preclusion espoused by the Petitioner, which focuses on the claims that might arise from a transaction, to the more pragmatic "transactional" theory. The transactional theory views the "claim in factual terms and [makes] it coterminous with the transaction regardless of the number of substantive theories . . . that may be available to the plaintiff." Restatement, §24(2), comment a. Section 24(2) implements the goal of Section 24(1), which is to prevent a plaintiff from "splitting" claims by defining the application of the rules of *res judicata* in terms of the transaction out of which the claims arose. Section 24(1) prevents the splitting of claims concerning "all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transactions, or a series

of connected transactions out of which the action arose." Restatement, §24(1).

Disclaiming the possibility of a "mathematically precise definition," Section 24(2) does not attempt to define a "transaction." A "transaction" invokes a "pragmatic standard to be applied with attention of the facts of cases." Restatement, §24(2), comment b. The comments confirm that what constitutes a transaction must be decided pragmatically with a focus on a "natural grouping or common nucleus of operative facts." *Id.*

Intervention is clearly not needed here. Nearly every Circuit follows the transactional test espoused by the Restatement.[20] That test is the product of the transition from the black letter, formalistic, and inequitable rules of the past to modern notions of flexibility, balance, and fairness. "Definitions of what constitutes the 'same cause of action' have not remained static over time." *Nevada v. United States,* 463 U.S. 110, 129 (1983). Contrary to St. Jude Hospital's fixation on a discrete element of the *res judicata* doctrine,[21] the

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[20] *See, e.g., U.S. Industries, Inc. v. Blake Constr. Co.,* 765 F.2d 195 (D.C. Cir. 1985); *Manego v. Orleans Board of Trade,* 773 F.2d 1 (1st Cir. 1985), *cert. denied,* 475 U.S. 1084 (1986); *Collard v. Incorporated Village of Flower Hill,* 759 F.2d 205 (2d Cir.), *cert. denied,* 474 U.S. 827 (1985); *Peugeot Motors of America, Inc. v. Eastern Auto Distributors, Inc.,* 892 F.2d 355 (4th Cir. 1989), *cert. denied,* 497 U.S. 1005 (1990); *Corpus Christi Taxpayers' Association v. City of Corpus Christi,* 858 F.2d 973 (5th Cir. 1988), *cert. denied,* 490 U.S. 1065 (1989); *Shaver v. F.W. Woolworth Co.,* 840 F.2d 1361 (7th Cir.), *cert. denied,* 488 U.S. 856 (1988); *Lane v. Peterson,* 899 F.2d 737 (8th Cir.), *cert. denied,* 498 U.S. 823 (1990); *C.D. Anderson & Co. v. Lemos,* 832 F.2d 1097 (9th Cir. 1987); *Lowell Staats Mining Co., supra.*

[21] It is ironic that St. Jude Hospital repeatedly cites the need to avoid multiple proceedings in support of its argument for a mechanistic application of *res judicata.* The actions of St. Jude

[footnote continued]

Restatement provides the courts of appeal with the flexibility needed to address the maze of factual scenarios encountered by modern courts. Certiorari review on this issue is not needed.

III.

THE FORMALISTIC APPROACH ADVOCATED BY PETITIONER WOULD UNDERMINE THE PERMISSIVE RULES GOVERNING JOINDER OF CLAIMS.

By focusing on the "could-have-been-raised" aspect of the *res judicata* doctrine and its attenuated relevance to Federal Rule of Civil Procedure 13(a) compulsory counterclaims, St. Jude Hospital would have the Court gut the permissive joinder rule of Federal Rule of Civil Procedure 18(a). That rule states this:

> A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim may join, either as independent or as alternate claims, as many claims, legal, equitable, or maritime, as the party has against an opposing party.

Rule 18(a) allows the joinder in a single suit of all claims existing between litigants. It is permissive, and the failure to join a claim does not necessarily bar its assertion in a subsequent action. 6A Charles A. Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice and Procedure* §1582, at 524 (2d ed. 1990).

Hospital and its affiliates, described by one Fifth Circuit panel as involving "as egregious and unconscionable course of bad faith contractual dealings as the members of this panel can recall having encountered," has spawned four separate civil actions, two Chapter 11 proceedings and six collateral actions challenging Travelers' several judgments. *See, e.g., Travelers Ins. Co. v. St. Jude Hospital of Kenner, La., Inc.*, 37 F.3d 193, 194 n.3 (5th Cir. 1994). Indeed, the Fifth Circuit has repeatedly commented on the "continuing" litigation marked by St. Jude Hospital and its affiliates' repeated, belated and "extremely intemperate" pleadings. *Travelers Ins. Co. v. Liljeberg Enterprises, Inc.*, 38 F.2d 1404, 1405 (5th Cir. 1994).

Rule 18(a) is merely a procedural device intended to promote judicial economy, prevent multiple lawsuits, and expedite the final determination of disputes. *See, e.g., Leimer v. Woods,* 196 F.2d 828, 833 (8th Cir. 1952). Joinder of claims under Rule 18(a) is not compulsory, and courts have taken care not to allow it to deprive litigants of substantive rights. "Rule 18 merely permits the joinder of other claims against the same party, but, faced with a very real controversy, the pleader, to flee from res judicata, need not dream up all imaginable disputes with the adversary dependent on the outcome of the then controversy and as to which predictions on consequential impact would involve theorizing on hypotheticals." *Dore v. Kleppe,* 522 F.2d 1369, 1374-75 (5th Cir. 1975), *rehearing denied,* 526 F.2d 697 (1976).

The United States Court of Appeals for the Eighth Circuit long ago emphasized the permissive policy behind Rule 18(a):

> [The] joinder of causes of action in federal practice has its source in Rule 18(a) . . . which permits and encourages the practice but does not compel it. This optional nature, coupled with the unilateralness of its right of exercise, could hardly soundly, without some unmistakable indication, be regarded as intended to affect in any substantive respect the rights of an adverse party as they would exist without the joinder. In other words, the Rule simply affords a vehicle for convenience, facilitation and economy in litigation procedurally, and it does not have as its object to put it within the power of one party or the court thereby to produce a substantive impingement upon any right or liability.

196 F.2d at 833.

Under the formalistic *res judicata* regime proposed by St. Jude Hospital, permissive joinder of claims would cease to exist. Every claim that "could have been raised" will be raised, and the permissive notions underlying Rule 18(a) would be undercut under Petitioner's fixed, formalistic approach to pleading. Indeed, St. Jude Hospital's inflexible understanding of *res judicata* would have the opposite effect intended by Petitioner: Rather than encourage the expedited resolution of *multiple* claims in a single proceeding, the "could have" approach to *res judicata* would instead *multiply* the claims asserted, as each litigant dreams up and pleads as many claims as possible to prevent the heavy-handed preclusive effect and application of St. Jude Hospital's *res judicata* doctrine. 522 F.2d at 1374-75. That is not the public policy behind Federal Rules of Civil Procedure 18(a). Travelers urges the Court to deny the petition.

CONCLUSION

This Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

RELEVANT STATUTORY PROVISIONS

Louisiana Code of Civil Procedure Article 737

A partnership has the procedural capacity to be sued in its partnership name.

The partners of an existing partnership may not be sued on a partnership obligation unless the partnership is joined as a defendant.

Louisiana Civil Code Article 2817

A partnership as principal obligor is primarily liable for its debts. A partner is bound for his virile share of the debts of the partnership but may plead discussion of the assets of the partnership.

C.R.S.A. §13-50-105

A partnership or other unincorporated association may sue or be sued in an action in its common name to enforce for or against it a substantive right; except that in such action only the property of the partnership or other unincorporated association, the joint property of the associates, and the separate property of any individual member thereof who is named as a party individually and over whom individually the court has acquired jurisdiction either by entry of appearance or by service of process may be bound by the judgment therein.

Federal Rule of Civil Procedure 18(a)

A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal, equitable, or maritime, as the party has against an opposing party.